9

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 169

THOMAS E. JACOB AND FRANK HOBSON, PLAINTIFFS IN ERROR,

vs.

S. L. ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED DECEMBER 7, 1909.

(21,925)

(21,925)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1909.**

## No. 699.

THOMAS E. JACOB AND FRANK HOBSON, PLAINTIFFS IN ERROR,

*vs.*

S. L. ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.


| | Original. | Print |
|---|---|---|
| Caption | 1 | 1 |
| Petition for writ of error | 2 | 1 |
| Order allowing writ of error | 11 | 5 |
| Assignment of errors | 13 | 7 |
| Bond on writ of error | 19 | 9 |
| Proceedings in superior court | 24 | 11 |
| Minutes of court (order on motion | 24 | 11 |
| Bill of exceptions | 25 | 12 |
| Motion to set aside judgment | 25 | 12 |
| Judgment-roll in Roberts *vs.* Hobson | 30 | 15 |
| Complaint | 30 | 15 |
| Summons and return | 32 | 16 |
| Amended complaint | 34 | 17 |
| Amended summons and return | 35 | 18 |
| Affidavit of publication of summons | 37 | 19 |
| Order for publication of summons | 39 | 20 |
| Affidavit of publication | 40 | 21 |
| Judgment by default | 42 | 22 |
| Certificate to judgment-roll | 43 | 22 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1909.

| | Original. | Print |
|---|---|---|
| Objections to motion | 44 | 23 |
| Order setting aside judgment | 44 | 23 |
| Specification of errors | 45 | 24 |
| Acceptance of service of draft of bill of exceptions | 46 | 24 |
| Judge's certificate to bill of exceptions | 47 | 24 |
| Notice of appeal | 47 | 25 |
| Stipulation as to record on appeal, &c | 48 | 25 |
| Opinion | 51 | 26 |
| Judgment | 55 | 29 |
| Clerk's certificate | 57 | 29 |
| Order allowing writ of error | 58 | 30 |
| Writ of error | 60 | 31 |
| Citation and service | 62 | 32 |

1 In the Supreme Court of the State of California.

L. A., No. 1809.

S. L. ROBERTS, Plaintiff and Appellant (Defendant in Error),
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error).

*Petition for Writ of Error to the Supreme Court of the United States.*

[SEAL.] F. L. CAUGHEY,
*Clerk of the Supreme Court of the State of California.*

2 [Endorsed:] In the Supreme Court of the State of California. L. A. No. 1809. In Bank. S. L. Roberts, Plaintiff and Appellant (Defendant in Error), vs. Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error). Petition for Writ of Error. Filed Oct. 18, 1909. F. L. Caughey, Clerk. By Dunlap, Dep. Sam Ferry Smith, Attorney for Thomas E. Jacob and Frank Hobson, Plaintiffs in Error. Sam Ferry Smith, Attorney-at-Law, Union Building, 1141 D Street, San Diego, Cal.

3 In the Supreme Court of the State of California.

L. A., No. 1809. In Bank.

S. L. ROBERTS, Plaintiff and Appellant (Defendant in Error),
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error).

*Petition for Writ of Error from the Supreme Court of the State of California to the Supreme Court of the United States of America.*

To the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California:

The Petition of Thomas E. Jacob and Frank Hobson respectfully shows:

That heretofore, to-wit: on the 17th day of July, 1897, the Superior Court of the County of San Diego, State of California, rendered and entered a judgment quieting title to real property in said county by default, in an action wherein S. L. Roberts was Plaintiff and

Thomas E. Jacob and Frank Hobson, (Petitioners herein) were Defendants. That in the Complaint in said action it was alleged that the Plaintiff was the owner in fee of certain premises therein described, and that the Defendants, and each of them, asserted title thereto, adverse to the said Plaintiff, but that the claim asserted by said Defendants was without any right whatever, and that the Defendants did not have any estate, right, title or interest whatsoever in or to the lands or premises, or any part thereof, described in said Complaint. That the Defendants were not personally
4 served with process in said action, but the service of process, and only service of process therein, was by a publication of the process in said action in a newspaper published in the County of San Diego, for a period of two months.

That the Defendants in said action did not discover until the month of June, 1905, that such a judgment had been rendered against them, and upon discovery thereof, Thomas E. Jacob and Frank Hobson, Plaintiffs in Error, pursuant to notice regularly given, made a motion in said Superior Court of the County of San Diego, State of California, to vacate said judgment and to declare void the proceedings and pretended judgment rendered in said action against them, upon the ground that the said judgment was, and is, a proceeding which did, and does, deprive the said Defendants, Thomas E. Jacob and Frank Hobson, of their property without due process of law, and did, and does, violate Section 1, Article XIV, of the Constitution of the United States, in that, no notice of said proceeding was given said Defendants and no opportunity was afforded them to appear and defend said action, which motion was granted by said Superior Court of the County of San Diego, State of California, on the 20th day of June, A. D. 1905, and said Court did on said day make its order vacating said Judgment and declaring void the said proceedings and pretended judgment against Petitioners herein, upon the ground named in said motion.

Thereafter, on the 10th day of July, A. D. 1905, the plaintiff in said action duly took an Appeal to the Supreme Court of the State of California from said Order vacating said judgment upon the aforesaid ground. That said Appeal came on for hearing and was heard in said Supreme Court of the State of California, on the
5 16th day of April, A. D. 1907, and thereafter, the said Supreme Court of the State of California, on the 19th day of September, A. D. 1908, did render a Final Judgment thereon, reversing the Order of the Superior Court of the County of San Diego, State of California, aforesaid, and by its judgment rendered a final judgment against Thomas E. Jacob and Frank Hobson, Defendants therein, Plaintiffs in Error, and in favor of said S. L. Roberts, Plaintiff therein, Defendant in Error.

Your Petitioners further show that the said judgment of the said Supreme Court of the State of California upon said matter was, and is, a final judgment in the highest court of the State of California, in which a decision in said suit could, or may be had.

Your Petitioners further show that a federal question was made and raised in said action, to-wit: That the motion made by them in

said Superior Court of the County of San Diego, State of California, on the 20th day of June, 1905, and which was ruled upon by said Court, was made upon the ground, that said judgment was, and is a proceeding which did, and does, deprive these Petitioners, Thomas E. Jacob and Frank Hobson, of their property without due process of law, and did, and does violate Section 1, Article XIV, of the Constitution of the United States, in that, no notice of said action was given said Defendants, and that no opportunity was afforded them therein to appear and defend said action; and that the order and judgment of said Court was made and based upon the ground named in said motion, and said Court did decide and did determine that said judgment was, and is, a proceeding which did, and does, deprive these Petitioners, Thomas E. Jacob and Frank Hobson, of their property without due process of law, and did, and does, violate
6 Section 1, Article XIV, of the Constitution of the United States, in that, no notice of said action was given said Defendants, and that no opportunity was afforded them therein to appear and defend said action; and that said Supreme Court of the State of California did, by its decision reversing said judgment and order of said Superior Court of the County of San Diego, State of California, decide the federal question presented by said Defendants in their said motion, Plaintiffs in Error herein, adversely to them. That a decision of the said federal question so presented was necessary to the final determination of said action and to the judgment rendered therein by said Supreme Court of the State of California.

Your Petitioners further show that they have prepared and presented herewith an Assignment of Errors based upon the records, proceedings, decision and final judgment of the Supreme Court of the State of California in said action, and have asserted that there is manifest error in each and all of said assignments, and that in each and all of said assignments of error a federal question is raised, and that the decision of said federal question is necessary to the final determination of the question so presented, to-wit:

(1) That the court erred in holding:—That the judgment rendered by the Superior Court of the County of San Diego, State of California, on the 15th day of July, 1897, against the Plaintiffs in Error herein and in favor of the Defendant in Error herein, did not, and does not, deprive these Plaintiffs in Error of their property without due process of law, and did not, and does not, conflict with, and is not, and was not, in violation of, the provisions of Section 1, Article XIV, of the Constitution of the United States, in that, it rendered a judgment therein depriving Plaintiffs in Error herein of their property in a judicial proceeding without notice to
7 said Plaintiffs in Error, and without affording Plaintiffs in Error *of* an opportunity to be heard in said proceeding in defense of their property rights before the rendition of said judgment.

(2) That said Court erred in holding:—That the Superior Court of the County of San Diego, State of California, had obtained or acquired jurisdiction over the persons of these Plaintiffs in Error

by the proceedings therein to render said judgment in favor of Defendant in Error herein and against Plaintiffs in Error herein.

(3) That said Court erred in holding:—That by and through said proceeding these Plaintiffs in Error were not deprived of their property without due process of law, and were therein given an opportunity to appear and defend said action.

(4) That said Court erred in holding:—That the Service of Process purported to have been made in said action upon the Plaintiffs in Error, and each of them, complied with the laws of the State of California, constituted due process of law, and did not, and does not, deprive these Plaintiffs in Error, and each of them, of their property without due process of law, without notice and without an opportunity to be heard, in contravention of the provisions of Section 1, Article XIV, of the Constitution of the United States, in this, that the laws of the State of California require that the process issued out of all Courts of said state in civil actions must be personally delivered to or served upon the party or parties who will be bound by the judgment sought to be obtained in said Court, except in five specific instances in which constructive service may be had, viz:

First. Where the Defendant resides out of the State.

Second. Where he has departed from the State.

Third. Where he cannot after due diligence be found within the State.

8 Fourth. Where he conceals himself to avoid service of process.

Fifth. Where the Defendant is a foreign corporation, etc."

But before any one or more of these exceptions apply, or can be invoked or exercised, and before the Court can acquire or obtain any jurisdiction to authorize such constructive service, the facts which show the existence of such exception must be made to appear to the Court by competent evidence adduced by Affidavit, showing to the satisfaction of the Court that such exception does exist. Whereas, in the action at bar, no personal service of process was made upon these Plaintiffs in Error, or either of them, and no showing was made to said Court by Affidavit that any one or more of said exceptions existed in said action to confer jurisdiction upon said Court to order constructive service of process upon these Plaintiffs in Error. On the contrary, said Court assumed to exercise jurisdiction to order such constructive service of process upon these Plaintiffs in Error, and each of them, upon the ground that they, and each of them, could not, after the exercise of due diligence, be found within the State, when, as a matter of fact, the record of said Court shows that no diligence whatever was used to find said Plaintiffs in Error in said State; that the only effort to find them was made in an infinitesimal part of said State, and that no showing whatever was made to said Court why the search for said parties was made in such part of the State, or why the same was confined there, or that the slightest search or inquiry outside of the confines of said limited area would not, and could not, have located the whereabouts of said parties, or that service could not be made upon them outside the confines of the limited portion of the State where said search was made.

(5) That the Court erred in holding:—That the provisions of the laws of the State of California, which require
9 due diligence to be exercised to find these Plaintiffs in Error in the entire state, before constructive service of process could be had upon them, upon the ground that they could not after the exercise of due diligence be found within said State, and before any judgment could be rendered in said action depriving them of their property in said State, were complied with in said action by the Defendant in Error herein, Plaintiff therein, making inquiry for said Defendants, Plaintiffs in Error herein, of fifteen persons, all of whom resided in one small city of the State, and not one of whom had ever known or heard of Plaintiffs in Error herein, and making no inquiry elsewhere in said state for said Defendants, and that the judgment rendered therein upon such pretended service of process, based upon such pretended diligence, did not, and does not, deprive Plaintiffs in Error herein of their property without due process of law, and did not, and does not, contravene Section 1, Article XIV, of the Constitution of the United States.

(6) That the Court erred in holding:—That the judgment and order of the Superior Court of the County of San Diego, State of California, vacating and setting aside the judgment theretofore rendered by said court, upon the ground that said judgment was, and is, a proceeding which did, and does, deprive said Defendants therein, Plaintiffs in Error herein, of their property without due process of law, and did, and does, violate Section 1, Article XIV, of the Constitution of the United States, and was not a proper, correct and lawful order to be made in the premises, and in reversing the said judgment or order of said Court.

Wherefore Your Petitioners pray for an Allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of California, and the judges thereof,
10 to the end that the record of said matter may be removed into the Supreme Court of the United States, and the error complained of by your Petitioners may be examined and corrected.

And your Petitioners will ever pray.

THOMAS E. JACOB,
FRANK HOBSON,
By SAM FERRY SMITH,
*Their Attorney in Law and in Fact.*

Said writ is allowed this Oct'r 18, 1909.

W. H. BEATTY,
*Chief Justice.*

11 [Endorsed:] In the Supreme Court of the State of California. L. A. No. 1809. In Bank. S. L. Roberts, Plaintiff and Appellant (Defendant in Error), vs. Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error). Order allowing writ of error. Filed Oct. 18, 1909. F. L. Caughey, Clerk. By Dunlap, Dep. Sam Ferry Smith, Attorney for Thomas E. Jacob and Frank Hobson, Plaintiffs in Error. Sam Ferry Smith, Attorney-at-Law, Union Building, 1141 D Street, San Diego, Cal.

12 In the Supreme Court of the State of California.

L. A., No. 1809. In Bank.

S. L. ROBERTS, Plaintiff and Appellant (Defendant in Error),
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error).

*Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of California.*

The above entitled matter coming on to be heard upon the Petition of Thomas E. Jacob and Frank Hobson, Petitioners herein and Respondents in the above entitled action, for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of California, and upon examination of said Petition and the record in said matter, and desiring to give the Petitioners herein and Respondents in the above entitled action, an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is hereby ordered that a Writ of Error be, and is hereby, allowed to this Court from the Supreme Court of the United States, and that the bond presented by said Petitioners be, and the same is, hereby approved.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

Dated Oct. 18, 1909.

13 [Endorsed:] In the Supreme Court of the State of California. L. A. No. 1809. In Bank. S. L. Roberts, Plaintiff and Appellant (Defendant in Error), vs. Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error). Assignment of Errors. Filed Oct. 18, 1909. F. L. Caughey, Clerk. By Dunlap, Dep. Sam Ferry Smith, Attorney for Thomas E. Jacob and Frank Hobson, Plaintiffs in Error. Sam Ferry Smith, Attorney-at-Law, Union Building, 1141 D Street, San Diego, Cal.

14 In the Supreme Court of the State of California.

L. A. No. 1809. In Bank.

S. L. ROBERTS, Plaintiff and Appellant (Defendant in Error),
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error).

*Assignment of Errors on Writ of Errors from the Supreme Court of the United States to the Supreme Court of the State of California.*

Now come Thomas E. Jacob and Frank Hobson, Defendants and Respondents in the above entitled action, and Plaintiffs in Error herein, and respectfully submit:—

That in the records, proceedings, decision, and final judgment of the Supreme Court of the State of California, in the above entitled action, there is manifest error, in this, to-wit:—

(1) That the Court erred in holding: That the judgment rendered by the Superior Court of the County of San Diego, State of California, on the 15th day of July, 1897, against the Plaintiffs in Error herein, and in favor of the Defendant in Error herein, did not, and does not, deprive these Plaintiffs in Error of their property without due process of law, and did not, and does not, conflict with, and is not, and was not, a violation of the provisions of Section 1, Article XIV, of the Constitution of the United States, in that, it rendered a judgment therein depriving Plaintiffs in Error herein of their property in a judicial proceeding without notice to said Plaintiffs in Error, and without affording Plaintiffs in Error
15 of an opportunity to be heard in said proceeding in defense of their property rights before the rendition of said judgment.

(2) That said Court erred in holding: That the Superior Court of the County of San Diego, State of California, had obtained or acquired jurisdiction over the persons of these Plaintiffs in Error by the proceedings therein to render said judgment in favor of Defendant in Error herein and against Plaintiffs in Error herein.

(3) That said Court erred in holding: That by and through said proceedings these Plaintiffs in Error were not deprived of their property without due process of law, and were therein given an opportunity to appear and defend said action.

(4) That said Court erred in holding: That the service of process purported to have been made in said action upon the Plaintiffs in Error, and each of them, complied with the laws of the State of California, constituted due process of law, and did not, and does not, deprive these Plaintiffs in Error, and each of them, of their property without due process of law, without notice and without an opportunity to be heard, in contravention of the provisions of Section 1, Article XIV, of the Constitution of the United States, in this, that the laws of the State of California require that the process issued out of all courts of said state in civil actions must be personally delivered

to or served upon the party or parties who will be bound by the judgment sought to be obtained in said Court, except in five specific instances in which constructive service may be had, viz:—

First. Where the Defendant resides out of the State.

Second. Where he has departed from the State.

Third. Where he cannot after due diligence be found within the State.

16 Fourth. Where he conceals himself to avoid service of process.

Fifth. Where the Defendant is a foreign corporation, etc."

But before any one or more of these exceptions apply, or can be invoked or exercised, and before the Court can acquire or obtain any jurisdiction to authorize such constructive service, the facts which show the existence of such exception must be made to appear to the Court by competent evidence adduced by Affidavit, showing to the satisfaction of the Court that such exception does exist. Whereas, in the action at bar, no personal service of process was made upon these Plaintiffs in Error, or either of them, and no showing was made to said Court by Affidavit that any one or more of said exceptions existed in said action to confer jurisdiction upon said Court to order constructive service of process upon these Plaintiffs in Error. On the contrary, said Court assumed to exercise jurisdiction to order such constuctive service of process upon these Plaintiffs in Error, and each of them, upon the ground that they, and each of them, could not, after the exercise of due diligence, be found within the State, when, as a matter of fact, the record of said Court shows that no diligence whatever was used to find said Plaintiffs in Error in said State; that the on'y effort to find them was made in an infinitesimal part of said State, and that no showing whatever was made to said Court why the search for said parties was made in such part of the State, or why the same was confined there, or that the slightest search or inquiry outside of the confines of said limited area would not, and could not, have located the whereabouts of said parties, or that service could not be made upon them outside the confines of the limited portion of the State where said search was made.

17 (5) That the Court erred in holding: That the provisions of the laws of the State of California, which require due diligence to be exercised to find these Plaintiffs in Error in the entire state, before constructive service of process could be had upon them, upon the ground that they could not after the exercise of due diligence be found within said State, and before any judgment could be rendered in said action depriving them of their property in said State, were complied with in said action by the Defendant in Error herein, Plaintiff therein, making inquiry for said Defendants, Plaintiffs in Error herein, of fifteen persons, all of whom resided in one small city of the State, and not one of whom had ever known or heard of Plaintiffs in Error herein, and making no inquiry elsewhere in said state for said Defendants, and that the judgment rendered therein upon such pretended service of process, based upon such pretended diligence, did not, and does not, deprive Plain-

tiffs in Error herein of their property without due process of law, and did not, and does not, contravene Section 1, Article XIV, of the Constitution of the United States.

(6) That the Court erred in holding: That the judgment and order of the Superior Court of the County of San Diego, State of California, vacating and setting aside the judgment theretofore rendered by said Court, upon the ground that said judgment was, and is, a proceeding which did, and does deprive said defendants therein, Plaintiffs in Error herein, of their property without due process of law, and did and does violate Section 1, Article XIV. of the Constitution of the United States, was not a proper, correct and lawful order to be made in the premises, and in reversing the said judgment or order of said Court.

Wherefore, The Plaintiffs in Error, Thomas E. Jacob and Frank Hobson, pray that the judgment and decision aforesaid of
18 the Supreme Court of the State of California may be reversed, annulled and altogether held for nought, and that they may be restored to all things which they have lost by said action, and because of the said judgment and decision.

SAM FERRY SMITH,
*Attorney for Plaintiffs in Error.*

19 [Endorsed:] L. A. 1809. Roberts v. Jacob. Bond on writ of error. Filed Oct. 18, 1909. F. L. Caughey, Clerk. By Dunlap, Dep.

20 In the Supreme Court of the State of California.

L. A. No. 1809. In Bank.

S. L. ROBERTS, Plaintiff and Appellant (Defendant in Error),
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB Hobson, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error).

*Bond on Writ of Error.*

Know all men by these presents, that the American Bonding Company, of Baltimore, a Corporation, is held and firmly bound unto S. L. Roberts in the sum of One Thousand ($1,000.00) Dollars to be paid to the said Obligee, his executors, administrators, and assigns, to the payment of which well and truly to be made, said American Bonding Company of Baltimore, a Corporation, itself and its successors by these presents.

Sealed with its seal and dated this 13th day of October, A. D. 1909.

Whereas the above named Plaintiffs in Error are about to prosecute and have taken steps to prosecute a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of California.

Now, therefore, the condition of this obligation is such, that if the above named Plaintiffs in Error shall prosecute their said Writ of Error to effect, and answer all costs and damages, if they shall
21 fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

AMERICAN BONDING COMPANY OF BALTIMORE,
[SEAL.] By F. S. HUGHES, *Its Attorney-in-Fact.*

STATE OF CALIFORNIA,
*County of Los Angeles, ss:*

Personally appeared before me, F. S. Hughes on this 13th day of October, one thousand nine hundred and nine, known to me to be the Attorney-in-Fact of the American Bonding Company of Baltimore, a corporation described in and which executed the annex- bond of Thos. E. Jacob and Frank Hobson, as surety thereon, and who being duly sworn, deposes and says that he resided at Los Angeles, in the State of California; that he is the said Attorney-in-Fact of the American Bonding Company of Baltimore, and knows the corporate seal thereof; that the said Company is duly and legally incorporated under the laws of the State of Maryland; and duly licensed to transact its business in the State of California. That the seal affixed to the annex- bond of Thos. E. Jacob and Frank Hobson is the corporate seal of the American Bonding Company of Baltimore, and thereto affixed by order and ahtuorized of the Executive Committee of said Company; and that he signed his name thereto by like order and authority as Attorney-in-Fact of said Company.

Sworn to, acknowledged before me, and subscribed in my presence, this 13th day of October, 1909.

[SEAL.] F. W. WEITZEL,
*Notary Public.*

I hereby approve the foregoing bond and surety this 18th day of October, A. D. 1909.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

22 & 23 Los Angeles District, No. 1809.

In the Supreme Court of the State of California.

Filed Apr. 4, 1906. Frank C. Jordan, Clerk, by R. L. Dunlap, Dep.

S. L. ROBERTS, Plaintiff and Appellant,
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and FRANK HOBSON, Defendants and Respondents.

From San Diego County.

Hon. E. S. Torrance, Judge.

*Transcript on Appeal.*

W. J. Mossholder, W. Parrish, Parrish & Mossholder, Attorneys for Plaintiff and Appellant.
Collier, Smith & Holcomb, Attorneys for Defendants and Respondents Thomas E. Jacob and Frank Hobson.

Filed this 21st day of Aug. 1905. Frank C. Jordan, Clerk, by R. L. Dunlap, Deputy Clerk.
State of California, District Court of Appeal, Second Appellate District. Filed Dec. 26 1905. W. D. Shearer, Clerk, by H. C. Lillie, Deputy.

24 In the Supreme Court of the State of California.

On Appeal from the Superior Court of the County of San Diego, State of California.

In the Superior Court of the County of San Diego, State of California.

No. 10091. Dept. 1.

S. L. ROBERTS, Plaintiff,
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and FRANK HOBSON, Defendants.

*Minutes of Court.*

"TUESDAY, JUNE 20TH, 1905.—The Court convenes at ten o'clock A. M. Present, Honorable E. S. Torrance, Judge. On this day comes the plaintiff by his attorneys, Messrs. Parrish & Mossholder, and comes the defendants Thomas E. Jacob and Frank Hobson by their attorneys, Messrs. Collier, Smith & Holcomb, and said de-

fendants by their counsel, pursuant to the notice of motion served and filed herein, made the motion hereinbefore set out, and the Court after argument of counsel for the respective parties, grants said motion upon the grounds named in said motion, and also that said judgment was and is a proceeding which did and does deprive the said defendants of their property without due process of law, and did and does violate Section 1, Article XIV, of the Constitution of the United States; to which ruling of the Court said plaintiff,
25 by his counsel, duly excepts.

On application of counsel for plaintiff thirty days are allowed plaintiff in which to prepare and present his proposed bill of exceptions to the above order of the Court."

(The following is plaintiff's bill of exceptions herein.)

No. 10091. Dept. 1.

(Title of Court and Cause.)

Be it remembered, that on the 20th day of June, A. D., 1905, at ten o'clock A. M., said defendants Thomas E. Jacob and Frank Hobson, pursuant to notice previously given, moved said Court to vacate, set aside and declare void the proceedings and pretended judgment rendered in the above entitled action against said defendants Thomas E. Jacob and Frank Hobson, on the 15th day of July, 1897, and entered on the 17th day of July, 1897, in so far as said judgment applies to said defendants Thomas E. Jacob and Frank Hobson, and to all the right, and title of said defendants and each of them in and to all the real property described in the judgment rendered herein upon the grounds, to-wit:

That said judgment was rendered and entered in a proceeding, and constitutes a proceeding which did not and does not comply with or conform to the laws of the State of California, as made and provided for the conducting of civil actions in the Courts of said State, and for the service of process upon the defendants in civil actions brought in the courts of said State; and which did deprive and does deprive these defendants, or either of them of property without due or any process of law, and without a compliance with the laws of said State; and that no jurisdiction of the persons of these defendants, or either of them, or the subject of the action, was ever had or obtained herein and which proceeding did and does
26 violate Section 1, Article XIV of the Constitution of the United States, in that it did and does deprive these defendants, or either of them of property without due process of law, and without a compliance of the laws of the State of California as enacted and adopted by the legislature thereof, in this:

That no summons or other process in said action was ever personally served on these defendants, or either of them.

That no service of summons was made upon these defendants: or either of them, by publication, as required by the laws of said State.

That no notice of this proceeding was ever given to these defend-

ants, or either of them, by the personal service of process upon them, or either of them.

That no notice of this proceeding was ever given to these defendants, or either of them, by any substituted service of process.

That no evidence was produced before said court or a judge thereof, which established as a fact, or which tended to establish as a fact, that these defendants, or either of them, concealed themselves to avoid the service of summons upon them, or either of them

That no evidence was produced before said Court, or a judge thereof, which established as a fact, or which tended to establish as a fact, that these defendants, or either of them, had departed from the State of California.

That no evidence was produced before said Court, or a judge thereof, which established as a fact, or which tended to estab-
27 lish as a fact, that these defendants, or either of them, could not, with due diligence be found within the State of California, and therefore personally served with process.

That no evidence was produced before said court, or a judge thereof, which established as a fact, or which tended to establish as a fact, that these defendants' place of residence or the place of residence of either of them, was not known to the plaintiff in this action at all times and during the pendency of this proceeding.

That no showing was made by affidavit or otherwise to said court, or a judge thereof, which contained satisfactory or any evidence which would produce moral certainty or conviction to an unprejudiced mind that due diligence had been used to find these defendants, or either of them, in the State of California, and that they, or either of them, could not, with the exercise of due diligence, have been found within the State of California.

That no jurisdiction or authority or power was vested in said Court, or a judge thereof, to order these defendants, or either of them, to be served with process by publication thereof until a showing had been first made by affidavit which established by such evidence as would produce moral certainty or conviction to an unprejudiced mind that due diligence had been used to find these defendants, or either of them, in the State of California, and that these defendants, or either of them could not with such due diligence be found within this State, and that no such affidavit was produced or presented to said Court, or a judge thereof, which established or tended to establish as a fact, by any satisfactory evidence,
28 that due or any diligence had been used to find these defendants, or either of them, in the State of California, and that as a result of such due diligence, they could not be found in the State of California.

That no evidence was produced before said court, or a judge thereof, which established as a fact, or which tended to establish as a fact, that the place of residence of these defendants, or either of them, was unknown to the plaintiff in the action.

That no evidence was produced before said Court, or a judge thereof, which would enable said court, or a judge thereof to determine whether or not these defendants, or either of them, should be

served by the deposit of a copy of the summons and complaint in said action in the United States Post Office directed to them, or either of them, at their place of residence.

That no evidence was produced before said Court, or a judge thereof, which did or could enable said Court to determine in what paper to order the summons in said action to be published.

That the purported service of summons or process, and only service of process in this proceeding on these defendants, or either of them, was not and is not such as is and was required by the laws of the State of California, and is not and does not constitute due process of law according to the laws of the State of California.

That the only service of process on these defendants, or either of them, was by publication, and is and was based upon the
29 ground that these defendants, or either of them, could not with due diligence, be found within the State of California.

That the proceeding for the publication of summons against these defendants, or either of them, did not and does not comply with the laws of the State of California, and did not and does not constitute due process of law, and did and does deprive these defendants, and each of them, of their property without due process of law and in contravention of the provisions of Section 1, Article XIV, of the Constitution of the United States of America, because and for the reason that no satisfactory evidence was produced before said court, or a judge thereof, which established as a fact, or which tended to establish as a fact, that these defendants, or either of them, could not have been found within the State of California, and therein personally served with process, had due diligence, and such diligence as is required by the laws of said State, been used by the plaintiff to find these defendants, or either of them, within the State of California.

That the affidavit upon which the service of summons by publication is based, did not and does not comply with the laws of the State of California, and did not and does not constitute due process of law under the laws of the State of California in each and all of the following particulars.

First. That said affidavit does not contain any evidence whatever which establishes as a fact that the residence of these defendants, or either of them, were not at all times during the pendency of said action known to the plaintiff in this action.

30 Second. That it does not contain any evidence which establishes as a fact that these defendants, or either of them, were not at all times during the pendency of this proceeding residents of the State of California and could therein have been personally served with process.

Third. That this affidavit does not show or purport to show, or does not establish or purport to establish as a fact, by any evidence, which ordinarily produces moral certainty and conviction to an unprejudiced mind, that the plaintiff herein had used due or any diligence to find these defendants, or either of them, within the State of California, and that after the exercise of due diligence these defendants could not have been found within the State of California.

And on the further ground that the Court rendering said judgment against said defendants, and each of them, had no jurisdiction of the person of said defendants, or either of them.

And in support of said motion introduced the judgment roll in said action, which judgment roll is in the words and figures following, to-wit:

In the Superior Court of the County of San Diego, State of California.

S. L. ROBERTS, Plaintiff,
vs.
THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON and FRANK HOBSON, Defendants.

Plaintiff complains and alleges:

31 1. That he is now, and for a long time hitherto has been, in the possession of that certain lot, piece, or parcel of land, situated, lying and being in the City of San Diego, County of San Diego, State of California, and bounded and described as follows, to-wit: The west one-half of the southwest quarter of the southeast quarter of pueblo lot E, of the Pueblo Lands of the City of San Diego, containing 5 acres.

2. That the said plaintiff claims title in fee to the said premises, and that the said defendants claim, and each and every of them claims, an estate or interest therein adverse to said plaintiff.

3. That the claim of the said defendants and each and every of them is without any right whatever, and that the said defendants have not any estate, right, title or interest whatever in said lands or premises, or any part thereof, nor has either or any of said defendants any right, title, or interest whatever in said lands or premises, or any part thereof.

Wherefore, the plaintiff prays:

1. That the defendants, and each and every of them, may be required to set forth the nature of their or his claim and that all adverse claims of the said defendants, and each and every of them, may be determined by a decree of this Court.

2. That the defendants, and each and every of them, be forever enjoined and debarred from asserting any claim whatever in and to said lands and premises adverse to the plaintiff, and for other relief as to this Honorable Court shall seem meet and agree-

32 able to equity, and his costs of suit.

PARRISH & MOSSHOLDER,
*Attorneys for Plaintiff.*

**(Duly verified by plaintiff.)**

**Filed Mar. 25, 1897.**

WILL H. HOLCOMB, *Clerk.*

In the Superior Court of the County of San Diego, State of California.

S. L. ROBERTS, Plaintiff,

vs.

THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and FRANK HOBSON, Defendants.

*Original Summons.*

The People of the State of California send greeting to Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, Defendants:

You are hereby required to appear in an action brought against you by the above named plaintiff in the Superior Court of the County of San Diego, State of California, and to answer the Complaint filed therein within ten days (exclusive of the day of service) after the service on you of this Summons, if served within this county, or if served elsewhere, within thirty days.

The said action is brought to obtain a judgment against you quieting Plaintiff's Title to that certain lot, piece, or parcel of land being in the City of San Diego, State of California, and described as follows, to-wit: The West One-half of the South-west quarter of the South-east quarter of Pueblo lot E, of the Pueblo Lands of the City of San Diego, containing 5 acres, and for other relief and his costs of this suit, as will more fully appear by reference to the Complaint on file herein.

33

And you are hereby notified that if you fail to appear and answer the said complaint as above required, said plaintiff will cause your default to be entered and take judgment against you for the relief demanded in the complaint.

Witness my hand and the Seal of the Superior Court of the County of San Diego, State of California, this 25th day of March, A. D. 1897.

WILL H. HOLCOMB, *Clerk*,
By WALTER M. EDWARDS, *Deputy*.

Received Mar. 25, 1897, at 3 o'clock P. M.

F. S. JENNINGS, *Sheriff*,
By D. L. KRETSINGER, *Deputy*.

Office of the Sheriff of the County of San Diego.

I hereby certify that I received the annexed Summons on the 25th day of Mar. 1897, and that after diligent search and inquiry I am unable to find the within named Defendants Thos. Hobson, Ed-

ward Hobson, Jacob Hobson & Frank Hobson or either of them in this San Diego County.

Dated this 26 day of M'ch, 1897.

F. S. JENNINGS, *Sheriff*,
By D. L. KRETSINGER,
*Deputy Sheriff*.

Filed June 9th, 1897.
WILL H. HOLCOMB, *Clerk*,
By T. J. STOREY, *Deputy*.

34 In the Superior Court of the County of San Diego, State of California.

S. L. ROBERTS, Plaintiff,
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and FRANK HOBSON, Defendants.

*Amended Complaint.*

Plaintiff complains and alleges:

1. That he is now and for a long time hitherto has been, in the possession of that certain lot, piece, or parcel of land, situated, lying and being in the City of San Diego, County of San Diego, State of California, and bounded and described as fol-ows, to-wit: The West One-half of the South-west quarter of the South-east quarter of Pueblo lot E, of the Pueblo Lands of the City of San Diego, containing 5 acres.

2. That the said Plaintiff claims title in fee to the said premises, and that the said Defendants claim, and each and every of them claims, an estate or interest therein adverse to said plaintiff.

3. That the claim of the said Defendants and each and every of them is without any right whatever, and that the said defendants have not any estate, right, title or interest whatever in said lands or premises, or any part thereof, nor has either or any of said defendants any right, title, or interest whatever in said lands or premises, or any part thereof.

Wherefore, the plaintiff prays:

1. That the defendants, and each and every of them, may
35 be required to set forth the nature of their or his claim and that all adverse claims of the said defendants, and each and every of them, may be determined by a decree of this Court.

2. That the defendants, and each and every of them, be forever enjoined and debarred from asserting any claim whatever in and to said lands and premises adverse to the plaintiff, and for other relief as to this Honorable Court shall seem meet and agreeable to equity, and his costs of suit.

PARRISH & MOSSHOLDER.

(Duly verified by plaintiff.)

Filed Apr. 3, 1897.
WILL H. HOLCOMB, *Clerk*,
By T. J. STOREY, *Deputy*.

In the Superior Court of the County of San Diego, State of California.

S. L. ROBERTS, Plaintiff,
vs.
THOMAS E. JACOB et al., Defendants.

*Original Amended Summons.*

The People of the State of California send greeting to Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson, and Frank Hobson, defendants:

You are hereby required to appear in an action brought against you by the above named plaintiff in the Superior Court of the County of San Diego, State of California, and to answer the
36 complaint filed therein within ten days (exclusive of the day of service) after the service on you of this Summons, if served within this County, or if served elsewhere, within thirty days.

The said action is brought to obtain a judgment against you quieting title to the W. ½ of the S. W. ¼ of S. E. ¼ of Pueblo lot E of the Pueblo Lands of the City of San Diego County of San Diego, State of California. The Complaint alleges that you and each of you claim some interest in said lands but alleges said claim is without any right whatever, as will more fully appear by reference to the Complaint filed herein.

And you are hereby notified that if you fail to appear and answer the said Complaint as above required, said plaintiff will cause your default to be entered and take judgment against you and each of you according to the prayer of said Complaint.

Witness my hand and the Seal of the Superior Court of the County of San Diego, State of California, this 3rd day of April, A. D. 1897.

[SEAL.] WILL H. HOLCOMB, *Clerk*.
By T. J. STOREY, *Deputy*.

Endorsed: Received Apr. 3 1897 at 3:30 o'clock P. M. F. S. Jennings, Sheriff, By D. L. Kretsinger, Deputy.

Office of the Sheriff of the County of San Diego.

I hereby certify that I received the annexed Summons on
37 the 3rd day of April, 1897, and that after diligent search and inquiry I am unable to find the within named Defendants Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, or either or any of them in this San Diego County.

Dated this 5th day of April, 1897.

F. S. JENNINGS,
By D. L. KRETSINGER,
*Deputy Sheriff*.

Filed June 9, 1897.
WILL H. HOLCOMB, *Clerk*,
By T. J. STOREY, *Deputy*.

(Title of Court and Cause.)

*Affidavit of Publication of Summons.*

STATE OF CALIFORNIA,
*County of San Diego, ss:*

S. L. Roberts being duly sworn says that he is the plaintiff in the above entitled action; and that the complaint in said action was filed with the Clerk of said Court on the 3rd day of April, 1897, and summons thereupon issued; that said summons has been returned by the sheriff indorsed that he could not find the defendants, or either of them, in his County; that said action is brought to quiet title to the West one-half of the South-west quarter of the South-east quarter of Pueblo lot E of the Pueblo Lands of the City of San Diego, situated in the City of San Diego, County of San Diego, State of California; that this affiant is the owner in fee, and is in the possession of said premises, and that the defendants claim some interest in said property, which said claim is without any right whatever; that said defendants, or either of them, have no estate, right, title
38 or interest whatever in said lands or premises or any part thereof. That the cause of action is fully set forth in his verified complaint on file herein; that said defendants, or either or any of them, after due diligence, cannot be found within this State, and this affiant, in support thereof, states the following facts and circumstances:

That affiant, for the purpose of finding said defendants and ascertain- their place of residence, has made due and diligent inquiry of the old residents of the City of San Diego, the former neighbors of said defendants, and is informed by D. Choate, who has lived in the City of San Diego over twenty-five years, that he thinks the defendants are not within the State of California, and he does not know of their residence and has not heard anything of them, or either of them or of their residence or postoffice address, for more than twenty years, and this affiant is informed by George W. Hazzard, who has lived in San Diego for over twenty-five years, that he has no knowledge as to the whereabouts of the said defendants, or either of them. Plaintiff also made inquiry of Ed. Dougherty, who is an old resident of San Diego, and said Ed. Dougherty informed plaintiff that he did not know the address or residence or where the defendants, or either of them, could be found, and did not believe that they were in the State. Plaintiff also made inquiry of E. E. Shaffer, County Auditor; John F. Forward, County Recorder; J. W. Thompson, County Treasurer; W. J. Cornell, County Tax Collector; John P. Burt, County Assessor; Frank S. Jennings, County Sheriff; Will H. Holcomb, County Clerk of San Diego County; and George D. Goldman, City Clerk; L. F. Doolittle, City Attorney; T. J. Dowell, City Tax Collector and Treasurer; Nat. R. Titus, City Assessor and Auditor; and R. V. Dodge, Postmaster of the City of San
39 Diego; and all of these gentlemen stated to affiant that they did not know the residence of the defendants, or either of

them, their Post-office address or where they could be found; and none of the above-named parties had heard of the post-office address or residence of the defendants, or either of them, since they have resided in the said city of San Diego.

The affiant has made other diligent inquiry to find said defendants, or either or any of them, and has not been able to find them or any of them within —. The affiant has no knowledge of the residence or post-office address of the defendants or either of them or where the defendants, or either of them, could be found. This affiant, therefore, says that personal service of said summons cannot be made on the defendants—Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, or either or any of them.

Wherefore, the affiant prays for an order that service of summons in this case may be made by publication thereof upon said defendants.

S. L. ROBERTS.

Subscribed in my presence and sworn to before me, this 5th day of April, 1897.

[SEAL.] C. F. HOLLAND,
*Notary Public.*

Filed: April 5th, 1897.
WILL H. HOLCOMB, *Clerk.*

(Title of Court and Cause.)

*Order for Publication of Summons.*

Upon reading and filing the affidavit of S. R. Roberts,
40 and it satisfactorily appearing therefrom that the defendants—Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, or either of them, cannot, after due diligence, be found within this State, and it also appearing, from the complaint herein duly verified by said plaintiff, that a good cause of action exists in this action in favor of the plaintiff therein and against the defendants; and that said defendants, Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, are, and each of them is, necessary and proper parties defendants thereto; and it further appearing that a summons has been duly issued out of said Court in this action, and that personal service of the same cannot be made upon the said defendants or upon either or any of them, for the reasons hereinbefore contained and by the said affidavit made to appear; upon motion of Parrish & Mossholder, Esqs., attorneys for the plaintiff, it is ordered that service of the summons in this action be made upon the defendants, Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, by publication thereof in the San Diegan Sun, a newspaper published in said County of San Diego, — is hereby designated as the news-

paper most likely to give notice to said defendants; that said publication be made at least once a week for two months.

J. W. HUGHES, *Judge.*

April 5th, 1897.

Filed: April 5th, 1897.
WILL H. HOLCOMB, *Clerk.*

(Title of Court and Cause.)

*Affidavit of Publication.*

STATE OF CALIFORNIA,
*County of San Diego, ss:*

41 E. H. Bagley, being duly sworn, deposes and says: That he is, and was at all times mentioned herein, over the age of eighteen years, and not interested as a party or otherwise in the above-named matter. That he is the Principal Clerk of the printers and publishers of the San Diegan Sun, a newspaper published daily, Sundays excepted, at the City of San Diego, in the above-named County and State. That as such Principal Clerk he has charge of all the advertisements published in said newspaper. That the Summons, of which the annexed clipping, which is referred to and made a part hereof, is a copy, has been published each day, Sundays excepted, in said newspaper for the period of two months, from the 6th day of April, 1897, to the 7th day of June, 1897, to-wit: Upon the 6th, 7th, 8th, 9th, 10th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 22nd, 23rd, 24th, 26th, 27th, 28th, 29th and 30th days of April, 1897, and upon the 1st, 3rd, 4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 20th, 21st, 22nd, 24th, 25th, 26th, 27th, 28th, 29th, and 31st days of May, 1897, and upon the 1st, 2nd, 3rd, 4th, 5th and 7th days of June, 1897, in each and every issue of said paper between the 5th day of April, 1897, and the 8th day of June, 1897, and that said publication was made in the newspaper proper and not in a supplement.

E. H. BAGLEY.

Subscribed and sworn to before me, this 8th day of June, 1897.

[SEAL.] E. F. CHASE,
*Notary Public in and for the County of San Diego, State of California.*

Filed: June 9th, 1897.
WILL H. HOLCOMB, *Clerk.*
By T. J. STOREY, *Deputy.*

42 The summons referred to in the foregoing affidavit of publication is that last hereinbefore set out, a printed copy of which summons was attached to said affidavit of publication.

(Title of Court and Cause.)

*Judgment by Default.*

In this action the defendants, Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson, and Frank Hobson, and all and each of them having been regularly served with process, and having failed to appear and answer, and each of them having failed to appear and answer the plaintiff's complaint herein, and the legal time for answering having expired, and the defaults of the said defendants and each of them in the premises having been duly entered according to law; now, on this 15th day of July, 1897, on application of Parrish & Mossholder, attorneys for said plaintiff, and the Court having heard the evidence offered on the part of the plaintiff;

It is now, therefore, hereby ordered, adjudged and decreed that the plaintiff have judgment as prayed for in his complaint against the said defendants, and each and all of them; that all adverse claims of the said defendants, and each of them, and all persons claiming or to claim said premises, or any part thereof, through or under said defendants, or either or any of them, are hereby adjudged and decreed to be invalid and groundless, and the defendants and each of them are hereby perpetually estopped from setting up any claims thereto, or to any part thereof..

Said premises are bounded and described as follows: That certain lot, piece or parcel of land, situated, lying and being in the City of San Diego, County of San Diego, State of California, and
43 bounded and described as follows, to-wit: The West One-half of the Southwest Quarter of the Southeast quarter of Pueblo Lot "E", of the Pueblo Lands of the City of San Diego, containing five (5) acres.

Dated July 15th, 1897.

E. S. TORRANCE,
*Judge of said Court.*

Endorsed: Filed Jul- 15, 1897. Will H. Holcomb, Clerk, By T. J. Storey, Deputy. Entered in Judgment Book 17, Page 347, July 17, '97.

(Title of Court and Cause.)

*Certificate to Judgment Roll.*

10091.

I, the undersigned, County Clerk of the County of San Diego, State of California, and ex-officio Clerk of the Superior Court in and for said County, do hereby certify the foregoing to be *e* true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book 17 of said Court, at Page 347. And I further cer-

tify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of said Court, this 17th day of July, 1897.

[SEAL.] WILL H. HOLCOMB, *Clerk*,
By HERBERT N. NEALE, *Deputy Clerk*.

Filed July 18th, 1897.
WILL H. HOLCOMB, *Clerk*,
By HERBERT N. NEALE, *Deputy Clerk*.

44 Said plaintiff, relying entirely upon the Judgment Roll herein, and that having been introduced by the defendant, offered nothing further, but objected to the granting of said motion upon the ground and for the reason that more than one year, to-wit: Nearly eight years had elapsed since the rendition and entry of the judgment herein, and that said judgment had become final, and that since an inspection of the Judgment Roll in said action did not show said judgment to be void upon its face, said Court had now no jurisdiction or power to set aside said judgment or to grant said defendants' motion; and said plaintiff also objected to the sufficiency of the notice of motion as not complying with Rule 12 of said Superior Court in not setting out the grounds upon which the motion would be made, over and beyond stating conclusions—the facts upon which the motion was based not being stated in the notice of motion, which objections were overruled by said Court and plaintiff duly excepted to such ruling.

Said Court having heard the evidence and the argument of counsel for the respective parties thereon, sustained said motion of said defendants, and made a minute order setting aside the judgment heretofore entered herein against said defendants, Thomas E. Jacob and Frank E. Hobson, which minute order is in words and figures following, to-wit:

"TUESDAY, *June 20th*, 1905.

"The Court convenes at Ten o'clock A. M.

Present: Honorable E. S. Torrance, Judge.

"On this day comes the plaintiff by his attorneys, Messrs. Parrish & Mossholder, and comes the defendants, Thomas E. Jacob
45 and Frank Hobson, by their attorneys, Messrs. Collier, Smith & Holcomb, and said defendants by their counsel, pursuant to the notice of motion served and filed herein, made the motion hereinbefore set out, and the Court, after argument of counsel for the respective parties, grants said motion upon the grounds named in said motion, and also that said judgment was, and is, a proceeding which did and does deprive the said defendants of their property without due process of law, and did and does violate Section 1, Article XIV, of the Constitution of the United States; to which ruling of the Court said plaintiff, by his counsel, duly excepts.

"On application of counsel for plaintiff thirty days are allowed plaintiff in which to prepare and present his proposed bill of exceptions to the above order of the Court."

(Title of Court and Cause.)

*Specification of Errors.*

Said Court erred in overruling plaintiff's objection to defendants' motion, for the reason that defendants did not, in their motion, specify the particulars in which the affidavit for publication of summons or the order of publication of summons was deficient, the statement that the affidavit was insufficient, and that the order of publication of summons was deficient, being merely conclusions; and for the further reason that defendants did not set out in their motion the particulars or for what reason the judgment was erroneous; and for the further reason that defendants did not state, in their notice of motion, the particulars in which the service of the summons upon defendants was insufficient.

46 The Court erred in granting defendants' motion to set aside the judgment, for the reason that the judgment had become final, and for the further reason that more than one year, to-wit, nearly eight years, had elapsed since the rendition and entry of said judgment, and therefore, and for that reason, the Court lost all jurisdiction to set aside the judgment, since the Judgment Roll does not show that said judgment was void, and the judgment not being void upon its face, and having been rendered more than one year prior to the notice of motion to set it aside, the Court had no jurisdiction or power to set it aside or vacate it.

And now said plaintiff presents and proposes the foregoing as a draft of his Bill of Exceptions herein, which he expects to use in support of his said appeal herein, and he respectfully asks said Court that the same be allowed and settled, and that, when engrossed, the same be signed by the Judge and filed with the Clerk of this Court as and for such Bill of Exceptions.

PARRISH & MOSSHOLDER,
W. J. MOSSHOLDER,
W. PARRISH,
*Attorneys for said Plaintiff.*

Service of the foregoing draft of plaintiff's Bill of Exceptions herein is hereby acknowledged this 11th day of July, A. D. 1905.

COLLIER, SMITH & HOLCOMB,
*Attorneys for said Defendants*
*Thomas E. Jacob and Frank Hobson.*

Counsel for all parties hereto this day appearing in open Court and consenting that the foregoing proposed Bill of Exceptions is correct and in due form, the same is by Court hereby
47 settled and allowed as correct and true, and that the same is in due form.

Done in open Court this 20th day of July, 1905.

E. S. TORRANCE,
*Judge of said Court.*

Filed: July 20th, 1905.

FRANK A. SALMONS,
*County Clerk,*
By HERBERT N. NEALE, *Deputy.*

(End of Plaintiff's Bill of Exceptions herein.)

(Title of Court and Cause.)

No. 10091. Dept. 1.

*Notice of Appeal.*

To the Clerk of said Superior Court, and to said defendants, Thomas E. Jacob and Frank Hobson, and to Messrs. Collier, Smith & Holcomb, attorneys for said defendants, Thomas E. Jacob and Frank Hobson:

You, and each of you, will please take notice that said plaintiff hereby appeals to the Supreme Court of the State of California from that certain order, and the whole thereof, made and entered herein in the minutes of said Superior Court on the 20th day of June, A. D., 1905, in favor of said defendants, Thomas E. Jacob and Frank Hobson, and against said plaintiff, thereby setting aside the judgment theretofore rendered and entered in the above entitled action in favor of said plaintiff and against said defendants.

48 Dated this 10th day of July, A. D., 1905.

PARRISH & MOSSHOLDER,
W. J. MOSSHOLDER,
W. PARRISH,
*Attorneys for Plaintiff and Appellant.*

Service of the within acknowledged this 10th day of July, 1905.

COLLIER, SMITH & HOLCOMB,
*Attorneys for Defendants*
*Thomas E. Jacob and Frank Hobson.*

Endorsed: Filed July 10th, 1905. Frank A. Salmons, Clerk, By T. J. Storey, Deputy.

(Title of Court and Cause.)

*Stipulation.*

It is hereby stipulated by the respective parties hereto that the foregoing printed transcript on appeal in said action is correct, and that said transcript, commencing with folio 6 on page 4 thereof, and extending to and including folio 97 on page 35 thereof, contains a true and correct copy of plaintiff's Bill of Exceptions, as allowed and settled herein by said Superior Court, to be used on this appeal; that said transcript also contains a true copy of the order of said

Superior Court setting aside the judgment rendered and entered herein in favor of said plaintiff and against said defendants, Thomas E. Jacob and Frank Hobson, which order is the order herein appealed from; also a true copy of plaintiff's notice of appeal
49 herein, and the acknowledgment of service thereof;

It is further hereby stipulated that an undertaking on appeal in due form was made and was properly filed herein on behalf of said plaintiff and appellant in said action within five days after the service and filing of plaintiff's said notice of appeal herein.

COLLIER, SMITH & HOLCOMB,
*Attorneys for said Defendants and Respondents Thomas E. Jacob and Frank Hobson.*
W. J. MOSSHOLDER,
W. PARRISH,
PARRISH & MOSSHOLDER,
*Attorneys for said Plaintiff and Appellant.*

50 Received copies of the foregoing transcript, this 19 day of August, 1905.

COLLIER, SMITH & HOLCOMB,
*Attorneys for Defendants and Respondents Thomas E. Jacob and Frank Hobson.*
FRANK A. SALMON,
*Clerk of the Superior Court of the County of San Diego, State of California.*
By T. J. STOREY, *Deputy.*

51 Filed Sep. 19, 1908. F. L. Caughey, Clerk, by Dryden, Deputy.

In Bank.

L. A., No. 1809.

S. L. ROBERTS, Plaintiff and Appellant,
vs.
THOMAS E. JACOB et al., Defendants and Respondents.

Judgment was entered in favor of plaintiff and against the defendants in 1897. Jurisdiction of the defendants was obtained by the substituted process of publication of summons. Eight years after the entry of judgment the trial court set it aside upon the ground that the facts set out in the affidavit for the order of publication did not show the due diligence required by Section 412 of the Code of Civil Procedure. Plaintiff appeals.

The affidavit for publication of summons in this case contained all that was embraced in the affidavit considered by the Court in Rue vs. Quinn, 137 Cal., 651. Moreover, it contained additional facts not averred in the affidavit considered in that case. In Rue vs. Quinn the affiant declared that he had made inquiry "of several prominent county officers" (giving the names of such officers) and

further stated, "I have also made inquiry of all other persons from whom I could expect to obtain information as to the residence or whereabouts of each of the said defendants, and, after such search and inquiry and due diligence, the said defendants cannot be found with- the state of California." In the affidavit in the case at bar, the plaintiff names twelve county officers of the county of whom he made inquiry without avail as to the whereabouts and post office address or residence of the defendants, or either of them. And, in
52 addition, he avers that he has made due and diligent inquiry of the old residents of the city of San Diego, the former neighbors of said defe-dants, and then proceeds to give their names, together with their statements of their inability to furnish any information. The affidavit here presented is thus more complete and persuasive in its statement of facts than that reviewed by this court in Rue vs. Quinn. It is substantially conceded by respondent that to uphold the judgment of the trial court, we must reverse the decision of Rue vs. Quinn, which has since been approved in Weiss vs. Cain. 73 Pac., 980; People vs. Wrinn, 143 Cal., 11; People vs. Norris, 144 Cal., 422; People vs. Mason, 144 Cal., 770; Sharp vs. Salisbury, 144 Cal., 721; Shepard vs. Mace, 148 Cal., 272; Cargile vs. Silsbee, 148 Cal., 260; Emery vs. Kipp, XXXVI Cal. Dec., 87. Respondent urges that we should do this upon the ground that the decision violates the familiar section 1, article XIV, of the Constitution of the United States, and that this federal question was not considered by the Court in rendering its decision. Herein respondent is in error. Every case where question arises of the sufficiency of substituted process necessarily embraces the proposition as to whether or not there has been due process of law. The provision of the Constitution of the United States does not differ in this respect from that found in article 1, section 13 of our own constitution. Since the case of Pennoyer vs. Neff, 95 U. S., 137, every case upon this subject-matter has been decided with direct reference, either express or necessarily implied, to these constitutional provisions. Respondent urges, however, that the decision of this court in Rue vs. Quinn does violence to the decision of the Supreme Court in Roller vs. Holly, 176 U. S., 402 and Marx vs. Ebner, 180 U. S., 314. In Roller vs. Holly, the notice upon the plaintiff in Rockingham county, Virginia, December 30, 1890, required him to appear in Limestone
53 county, Texas, on January 5, 1891, five days thereafter, to answer in a foreclosure suit. The Supreme Court laid down the indisputable proposition that a notice would be of no value unless the time limited by it were reasonable and adequate for the purpose, and held that the time limited by this notice under these circumstances was unreasonable, and that, therefore, there was not the due process of law. There is certainly nothing in this case touching upon the questions decided in Rue vs. Quinn. In Marx vs. Ebner, the affidavit for publication of summons showed that summons had been issued and returned by the marshal with the statement "that after due and diligent search neither of the within named defendants, nor their agents, could be found within this district." The same return to the summons is made by the sheriff in the case at bar. The

affidavit of publication of summons, in addition to the return of the marshal showed that one of the defendants was a foreign corporation, existing under the laws of the state of Oregon; that another defendant Farrell was not a resident of the District of Alaska, but resided in the city of Portland. It further appeared that no officer of the defendant corporation resided within the District of Alaska, and that the corporation had no managing agent or representative within the district; that the post office address was No. 246 Washington street, Portland, Oregon, and that Portland, Oregon, was also the post office address of the defendant Farrell. Objection to the sufficiency of this affidavit was made upon the ground that it did not disclose any diligence, or that after due diligence the defendants or either of them could not be found in the territory. The supreme court said: "The objection is made by the appellant that there was no sufficient proof that the defendants after due diligence could not be found, and, therefore, the court ordering the publication had no jurisdiction to make the order; that the simple statement of the marshal that defendants could not be found after due and diligent
54 search was no proof that any such search had been made and that it was necessary to show what had been done in the way of searching for defendants, so that the court could itself judge whether due diligence had been exercised. Taking the return of the officers with the other facts proved, we think this contention is not well founded." The affidavit- in the case at bar, as well as the affidavit in Rue vs. Quinn, were much fuller and more complete in their statement of facts showing diligence, than was the affidavit held sufficient by the supreme court in the case under consideration. Therefore, neither upon the merits of respondents' contention, nor upon the authorities which are cited, is any reason shown for a departure from the decision of this Court in Rue vs. Quinn, nor for an affirmance of the order of the trial court in setting aside the judgment in this case.

For which reasons the order appealed from is reversed.

HENSHAW, *J.*

We Concur:

ANGELLOTTI, *J.*
LORIGAN, *J.*
SLOSS, *J.*
SHAW, *J.*

55 In the Supreme Court of the State of California.

L. A., No. 1809.

S. L. ROBERTS, Pl't'ff & Appellant,
vs.
THOMAS E. JACOBS, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON and FRANK HOBSON, Def'ts & Respondents.

Bank.

On Appeal from the Superior Court in and for the County of San Diego.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Henshaw, J., per concur: Angellotte, J., Lorigan, J., Sloss, J., Shaw, J.

Whereupon, it is ordered, adjudged, and decreed by the Court that the Order of the Superior Court in and for the County of San Diego in the above entitled cause, be and the same is hereby reversed Appellant to recover costs of appeal.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 19th day of September, 1908, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 26th day of November, A. D. 1909.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk*,
By I. ERB, *Deputy*.

56 [Endorsed:] L. A. No. 1809. In the Supreme Court, State of California. Remittitur. S. L. Roberts, Pl't'ff & App., vs. Thomas E. Jacobs et als., Def'ts & Resps. Clerk's costs, $—. Paid by Appellant, $—. Paid by Respondent, $—. Total, $10. F. L. Caughey, Clerk, by I. Erb, Deputy.

57 In the Supreme Court of the State of California.

L. A., No. 1809.

S. L. ROBERTS, Plaintiff and Appellant (Defendant in Error),
vs.
THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error).

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed are

true and correct copies of Petition for Writ of Error, Order Allowing Writ of Error, Assignment of Error, Bond on Writ of Error, Transcript on Appeal, and Opinion of the Supreme Court of the State of California thereon, on file in my office in the above-entitled cause.

Witness my hand and the seal of the Court, this 26th day of October, A. D. 1909.

[Seal Supreme Court of California.]

F. L. CAUGHEY,
*Clerk of the Supreme Court of the State of California.*

58 Original.

In the Supreme Court of the State of California.

L. A., No. 1809. In Bank.

S. L. ROBERTS, Plaintiff and Appellant (Defendant in Error),

vs.

THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error).

*Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of California.*

The above entitled matter coming on to be heard upon the Petition of Thomas E. Jacob and Frank Hobson, Petitioners herein and Respondents in the above entitled action, for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of California, and upon examination of said Petition and the record in said matter, and desiring to give the Petitioners herein and Respondents in the above entitled action, an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is hereby ordered That a Writ of Error be, and is hereby, allowed to this Court from the Supreme Court of the United States, and that the bond presented by said Petitioners be, and the same is, hereby approved.

Dated Ocbr. 18, 1909.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

59 [Endorsed:] Original. In the Supreme Court of the State of California. L. A. No. 1809. In Bank. S. L. Roberts, Plaintiff and Appellant, (Defendant in Error) vs. Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson, and Frank Hobson, Defendants and Respondents, (Plaintiffs in Error). Order allowing writ of error. Filed Oct. 18 1909. F. L. Caughey, Clerk, by Dunlap, Dep. Sam Ferry Smith, Attorney for Thomas E. Jacob and Frank Hobson, Plaintiffs in Error. Sam Ferry Smith, attorney-at-law, Union Building, 1141 D Street, San Diego, Cal.

60 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Judges of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of the plea which is in the said Supreme Court of the State of California, before you, between S. L. Roberts, Plaintiff and Appellant (Defendant in Error) vs. Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, Defendants and Respondents (Plaintiffs in Error) a manifest error hath happened to the great damage of the said Thomas E. Jacob and Frank Hobson as by their complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington in the District of Columbia on the twenty-ninth day of January next in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this first day of December in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States, the one hundred and thirty-fourth.

[Seal U. S. Circuit Court, Southern Dist. Cal. 1886.]

WM. M. VAN DYKE,

*Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.*

61 [Endorsed:] L. A. No. 1809. In the Supreme Court of the State of California. S. L. Roberts, Plaintiff & Appellant (Defendant in Error), vs. Thomas E. Jacob et al., Defendants & Respondents (Plaintiffs in Error). Writ of error. Filed Dec. 1, 1909. F. L. Caughey, Clerk, by M. C. Van Allen, Dep. Sam Ferry Smith, Att'y for Plaintiffs in Error.

62 In the Supreme Court of the State of California.

L. A., No. 1809. In Bank.

S. L. ROBERTS, Plaintiff and Appellant (Defendant in Error),

vs.

THOMAS E. JACOB, THOMAS HOBSON, EDWARD HOBSON, JACOB HOBSON, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error).

*Citation to Defendant in Error in Case Removed to the Supreme Court of the United States from the Supreme Court of the State of California.*

UNITED STATES OF AMERICA, *ss:*

To S. L. Roberts, Plaintiff and Appellant in the above-entitled action and Defendant in Error herein, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of California, wherein Thomas E. Jacob and Frank Hobson are Plaintiffs in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Thomas E. Jacob and Frank Hobson, Plaintiffs in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Attest The Honorable William H. Beatty, Chief Justice of the Supreme Court of the State of California, this 18th day of October, in the year of our Lord One Thousand Nine Hundred and Nine.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

Attest:

[Seal Supreme Court of California.]

F. L. CAUGHEY,
*Clerk of the Supreme Court of the State of California,*
By R. L. DUNLAP, *Deputy.*

63 [Endorsed:] Original. In the Supreme Court of the State of California. L. A. No. 1809. In Bank. S. L. Roberts, Plaintiff and Appellant (Defendant in Error), vs. Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson, and Frank Hobson, Defendants and Respondents (Plaintiffs in Error). Citation to defendant in error. Received copy of within citation for the defendant in error this 25th day of October, A. D. 1909. W. J. Moss-

holder, attorney for def'ts in error. Sam Ferry Smith, attorney for Thomas E. Jacob and Frank Hobson, Plaintiffs in Error. Sam Ferry Smith, attorney-at-law, Union Building, 1141 D Street, San Diego, Cal.

Received copy of the within citation for the Defendant in Error this 25th day of October A. D. 1909.

W. J. MOSSHOLDER,
W. PARRISH &
PARRISH & MOSSHOLDER,
*Attorneys for Defendants in Error.*

STATE OF CALIFORNIA,
*County of San Diego, ss:*

Kirk Cornell, being first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years, and is not a party to or in any manner interested in the within entitled action. That on the 29th day of October, A. D. 1909, he served a full, true and correct copy of the annexed Citation to Defendant in Error on S. L. Roberts, the Plaintiff and Appellant in the action therein entitled, and the Defendant in Error herein, by delivering to and leaving with the said S. L. Roberts personally in the County of San Diego, State of California, a full, true and correct copy of the within Citation to Defendant in Error.

KIRK CORNELL.

Subscribed and sworn to before me this 29th day of October, A. D. 1909.

[Seal Notary Public, San Diego Co., California.]

AUG. R. SCHIMPFF,
*Notary Public in and for the County of San Diego, State of California.*

Endorsed on cover: File No. 21,925. California Supreme Court. Term No. 699. Thomas E. Jacob and Frank Hobson, plaintiffs in error, vs. S. L. Roberts. Filed December 7th, 1909. File No. 21,925.

[redacted]

OCTOBER TERM, 1911

No. 169

THOS. B. JACOBY AND
FRANK HOBSON,

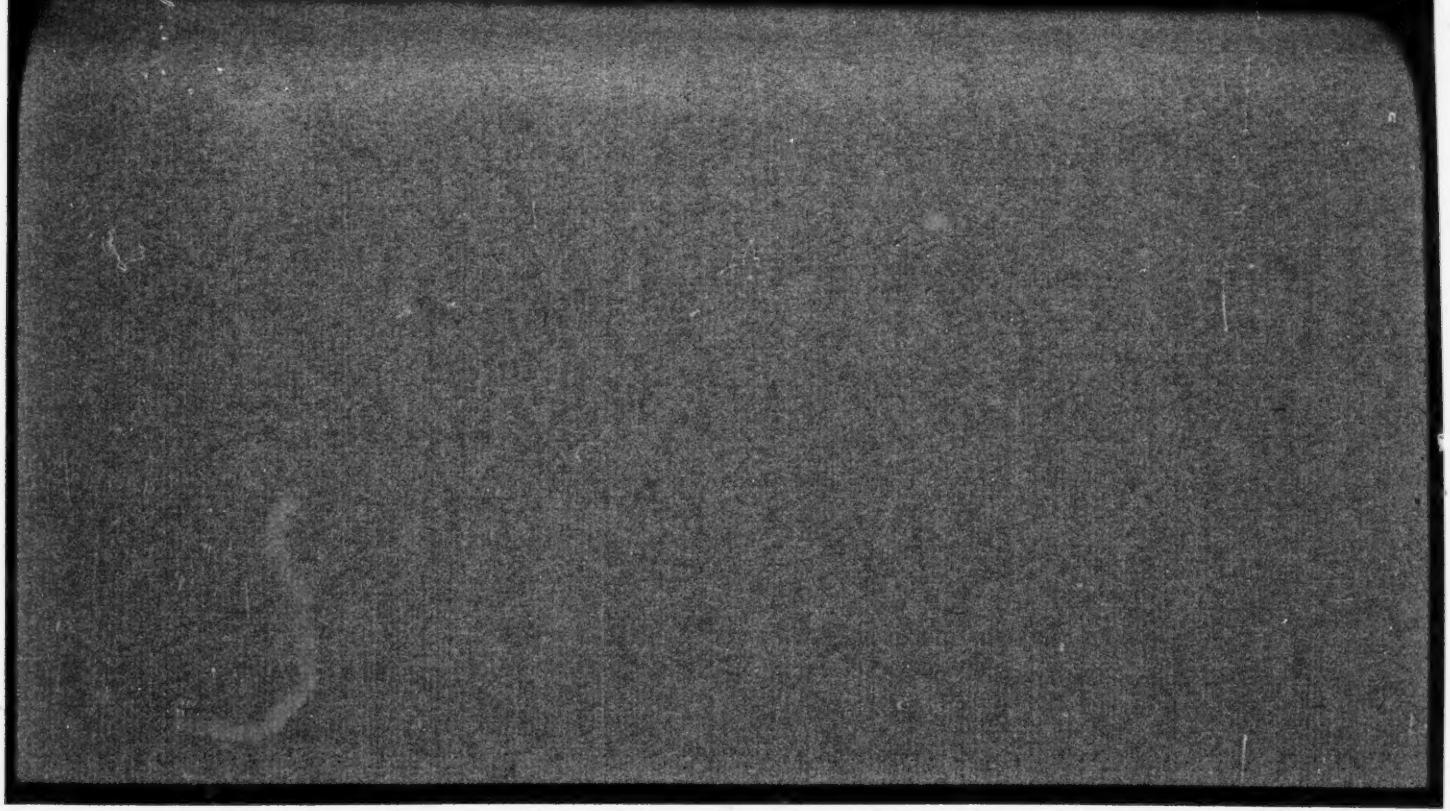
Plaintiffs in Error,

vs.

S. L. ROBERTS,

Defendant in Error.

[redacted]



## INDEX TO QUESTIONS DISCUSSED


Page.

Statement of the Case ..... 1

Assignments of Error ..... 5

The Question Presented to This Court for Review ..... 9

The Law of the State of California Relating to Constructive or Substituted Service of Process ..... 10

The Affidavit Under Consideration Herein, and Upon Which Substituted Service was Obtained ..... 13

"Due Process of Law" as Defined by This Court and Other Authorities, and Its Application to the Case at Bar ..... 16

There is a Federal Question Involved Herein Which was Properly Raised in the Court Below, and is Properly Presented Herein ..... 26

The Object of the Statute ..... 33

What Must Be Shown by the Affidavit Before the Court Acquires Jurisdiction to Make an Order for Substituted Service ..... 34

What the Statute Requires and What the Affidavit Shows ..... 35

Further Comparison of the Affidavit with the Statutory Requirements ..... 39

Further Reasons Why the Affidavit is Insufficient to Confer Jurisdiction to Order Substituted Service ..... 46

# TABLE OF CASES CITED


| | Page. |
|---|---|
| Arndt vs. Griggs, 134 U. S., 321 | 19 |
| Belcher vs. Chambers, 53 Cal., 635 | 32 |
| Braly vs. Seaman, 30 Cal., 611 | 43 |
| Burton vs. Platter, 53 Fed., 903 | 23 |
| Cooper vs. Newell, 173 U. S., 555 | 32 |
| De La Montanya vs. De La Montanya, 112 Cal., 109 | 25 |
| Galpin vs. Page, 18 Wall., 350, 368 | 16-30 |
| Hagar vs. Reclamation District, 111 U. S., 708 | 20 |
| Happy vs. Mosher, 48 N. Y., 317 | 22 |
| Hahn vs. Kelly, 34 Cal., 407 | 42 |
| Hart vs. Sansom, 110 U. S., 151 | 32 |
| Holden vs. Hardy, 169 U. S., 389 | 21 |
| Hooker vs. Los Angeles, 188 U. S., 314-318 | 17 |
| Mallett vs. State, 181 U. S., 589 | 32 |
| Marx vs. Ebner, 180 U. S., 314 | 42 |
| Neff vs. Pennoyer, 17 Fed., 1279 | 54 |
| Pennoyer vs. Neff, 95 U. S., 737 | 20-28 |
| Roberts vs. Jacobs, 154 Cal., 307 | 5 |
| Roller vs. Holly, 176 U. S., 402 | 24-32 |
| Ricketson vs. Richardson, 26 Cal., 149 | 31-42-44 |
| Rue vs. Quinn, 137 Cal., 651 | 5-28 |
| Scott vs. McNeal, 154 U. S., 34 | 29 |
| Shepherd vs. Ware, 48 N. W., 774 | 22 |
| State vs. Guilbert, 47 N. E., 557 | 21 |
| Simon vs. Craft, 182 U. S., 436 | 17 |
| Thompson vs. Circuit Judge, 54 Mich., 237 | 42 |
| Wilson vs. Standefer, 184 U. S., 399-415 | 17 |

# Supreme Court

of the

# United States

OCTOBER TERM, 1911

No. 169

THOS. E. JACOB AND
FRANK HOBSON,
*Plaintiffs In Error,*

VS.

S. L. ROBERTS.
*Defendant in Error.*

**In Error to the Supreme Court of the State of California**

## BRIEF OF PLAINTIFFS IN ERROR

### STATEMENT OF THE CASE.

On the 11th day of March, A. D. 1873, the Plaintiffs in Error, Thomas Edward Jacob and Frank Hobson, purchased of and from D. Felsenheld, five acres of land in the City of San Diego, County of San Diego, State of California, thereby acquiring the fee simple title thereto. They

have never parted with their title thereto. This five acre tract was sold to G. C. Arnold by the Tax Collector of the City of San Diego for delinquent taxes levied thereon in the year 1891, and by said Arnold sold to one F. B. Walker, who in turn conveyed the same to S. L. Roberts, Defendant in Error herein.

On the 25th day of March, 1897, the said S. L. Roberts, basing his action upon his ownership of said premises under and by virtue of said tax deed, commenced an action in the Superior Court of the County of San Diego against the alleged adverse claims of four defendants, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson. The complaint consisted of but one count containing the usual allegations in an action to quiet title. A summons was issued on the same day the complaint was filed and was placed in the hands of the Sheriff of San Diego County for service. *One day later* the sheriff made his return that he was unable to find said defendants, or either of them, in the County of San Diego; eight days later, the plaintiff filed an amended complaint adding thereto the name of Thomas Edward Jacob as one of the defendants, and on the same day an amended summons was issued directed to all of the defendants, which amended summons was immediately placed in the hands of the sheriff for service, and *two days later* the sheriff made his return thereon that he could not find said defendants, or either of them, in the County of San Diego. *On the same day* that the sheriff made such return, namely: *two days* after the filing of said amended

complaint, the said S. L. Roberts filed an affidavit asking for the publication of summons against the defendants, Thomas Edward Jacob and Frank Hobson, deposing therein that he could not, after due diligence, find said defendants within the State of California; and, on the same day that said affidavit was filed, viz: *just two days after the filing of such amended complaint, an order was made by the Superior Court of the County of San Diego for publication of summons against the defendants,* Thomas Edward Jacob and Frank Hobson; and one hundred days thereafter a judgment was rendered by default against the said defendants, Thomas Edward Jacob and Frank Hobson (who were residents of Ireland) depriving them of their property. No service other than said publication based upon said affidavit was made, or attempted to be made, upon them.

In June, 1905, said Thomas Edward Jacob and Frank Hobson, discovering that such a judgment had been rendered against them and that thereby they had been deprived of their property, after due notice given, made a motion in said Superior Court, the court which had rendered such judgment, to set aside, vacate and annul such judgment so rendered upon the grounds, viz:

1st. That the Court rendering same had no jurisdiction over the person of said defendants to render such a judgment.

2nd. That no process was ever served upon them, or either of them.

3rd. That the said judgment so rendered was ren-

dered and entered in a proceeding, and constituted a proceeding, which did and does violate Section 1, Article XIV. of the Constitution of the United States, and did and does deprive them of their property without due process of law, and in contravention of said constitutional provision, in, that no notice was ever given them, or either of them, of the pendency of said action, and that no opportunity was afforded them, or either of them, to defend therein before judgment was rendered against them.

Said motion was by said Court granted; and, by an order duly given, made and entered in its records, said Superior Court of the County of San Diego vacated said judgment, and set the same aside. Such order was made upon the ground:

> "That said judgment was, and is, a proceeding which did and does violate Section 1, Article XIV. of the Constitution of the United States."

From the order granting said motion and vacating such judgment, the plaintiff therein, S. L. Roberts, took an appeal to the Supreme Court of the State of California, and on the 19th day of September, A. D. 1908, said Court made an order reversing said judgment and directing the lower Court to re-instate such judgment; the legal effect of such reversal being a re-affirmance of, and a re-establishment of, the judgment theretofore rendered.

From that decision of the Supreme Court of the State of California a writ of error was prosecuted to this Court, the writ being granted on October 18th, A. D. 1909, by

the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California. The opinion of said Court was delivered by Mr. Justice Henshaw and was concurred in by four other Justices, making it a decision of said Court in Banc, and it is reported in full in Volume 154 of California Reports, at Page 307, *et seq.* The decision of said Court is predicated entirely upon a previous decision of the same Court in a case involving the same question, entitled *Rue* vs. *Quinn,* which is reported in the 137th California Reports, at Page 651, which was also a decision in Banc of said Court.

## ASSIGNMENTS OF ERROR.

The Assignments of Error specified are fully set forth in the Transcript at pages 7 to 9, but for convenience we will repeat them herein. They are as follows:

### ASSIGNMENT No. 1.

That the Court erred in holding: That the Judgment rendered by the Superior Court of the County of San Diego, State of California, on the 15th day of July, 1897, against the Plaintiffs in Error herein, and in favor of the Defendant in Error herein, did not, and does not, deprive these Plaintiffs in Error of their property without due process of law; and did not, and does not, conflict with, and is not, and was not, a violation of, the provisions of Section 1, Article XIV. of the Constitution of the United States, in that it rendered a Judgment therein depriving Plaintiffs in Error herein of their property in a judicial

proceeding without notice to said Plaintiffs in Error, and without affording Plaintiffs in Error of an opportunity to be heard in said proceeding in defense of their property rights before the rendition of said Judgment.

ASSIGNMENT No. 2.

That said Court erred in holding: That the Superior Court of the County of San Diego, State of California, has obtained or acquired jurisdiction over the persons of these Plaintiffs in Error by the proceedings therein to render said Judgment in favor of Defendant in Error herein and against Plaintiffs in Error herein.

ASSIGNMENT No. 3.

That said Court erred in holding: That by and through said proceedings these Plaintiffs in Error were not deprived of their property without due process of law, and were therein given an opportunity to appear and defend said action.

ASSIGNMENT No. 4.

That said Court erred in holding: That the service of process purported to have been made in said action upon the Plaintiffs in Error, and each of them, complied with the laws of the State of California, constituted due process of law, and did not and does not deprive these Plaintiffs in Error, and each of them, of their property without due process of law, without notice and without an opportunity to be heard, in contravention of the provisions of Section 1, Article XIV. of the Constitution of the United Stated, in this,—that the laws of the State of California

require that the process issued out of all courts of said state in civil actions must be personally delivered to or served upon the party or parties who will be bound by the Judgment sought to be obtained in said Court, except in five specific instances in which constructive service may be had, viz:

*First.* Where the Defendant resides out of the State.

*Second.* Where he has departed from the State.

*Third.* Where he cannot after due diligence be found within the State.

*Fourth.* Where he conceals himself to avoid service of process.

*Fifth.* Where the Defendant is a foreign corporation, etc.

But before any one or more of these exceptions apply or can be invoked or exercised, and before the Court can acquire or obtain any jurisdiction to authorize such constructive service, the facts which show the existence of such exception must be made to appear to the Court by competent evidence adduced by Affidavit, showing to the satisfaction of the Court that such exception does exist. Whereas, in the action at bar, no personal service of process was made upon these Plaintiffs in Error, or either of them, and no showing was made to said Court by Affidavit that any one or more of said exceptions existed in said action to confer jurisdiction upon said Court to order constructive service of process upon these Plaintiffs in Error. On the contrary, said Court assumed to exercise jurisdiction to order such constructive service of process

upon these Plaintiffs in Error, and each of them, upon the ground that they, and each of them, could not after the exercise of due diligence, be found within the State; when, as a matter of fact, the record of said Court shows that no diligence whatever was used to find said Plaintiffs in Error in said State; that the only effort to find them was made in an infinitesimal part of said State, and that no showing whatever was made to said Court why the search for said parties was made in such part of the State, or why the same was confined there, or that the slightest search or inquiry outside of the confines of said limited area would not, and could not, have located the whereabouts of said parties; or that service could not be made upon them outside the confines of the limited portion of the State where said search was made.

ASSIGNMENT No. 5.

That the Court erred in holding: That the provisions of the laws of the State of California, which require due diligence to be exercised to find these Plaintiffs in Error in the entire state, before constructive service of process could be had upon them, upon the ground that they could not, after the exercise of due diligence, be found within said State; and before any Judgment could be rendered in said action depriving them of their property in said State, were complied within said action by the Defendant in Error herein (Plaintiff therein) making inquiry for said defendants, (Plaintiffs in Error herein, of fifteen persons, all of whom resided in one small City of the State,

and not one of whom had ever known or heard of the Plaintiffs in Error herein, and making no inquiry elsewhere in said state for said defendants, and that the Judgment rendered therein upon such pretended service of process, based upon such pretended deligence, did not and does not deprive Plaintiffs in Error herein of their property without due process of law, and did not and does not contravene Section 1, Article XIV. of the Constitution of the United States.

ASSIGNMENT No. 6.

That the Court erred in holding: That the Judgment and Order of the Superior Court of the County of San Diego, State of California, vacating and setting aside the Judgment theretofore rendered by said Court upon the ground that said judgment was and is a proceeding which did and does deprive said Defendants therein, Plaintiffs in Error herein, of their property without due process of law, and did and does violate Section 1, Article XIV. of the Constitution of the United States, was not a proper, correct and lawful Order to be made in the premises; and in reversing the said Judgment or Order of said Court.

**THE QUESTION PRESENTED TO THIS COURT FOR REVIEW.**

Plaintiffs in Error claim that the Judgment which was rendered against them, depriving them of their property, was rendered in a proceeding, and constituted a proceeding, wherein the only service of process made, or attempted to be made, was a substituted or constructive service,

and that such service did not give them reasonable or adequate opportunity of being heard therein, prior to the rendition of such judgment; and therefore did not constitute due process of law, and such proceedings were taken and had against them in violation of the constitutional right guaranteed them by Section 1, Article XIV, of the Constitution of the United States that no Judgment should be rendered against them except by "Due process of Law", which, as the meaning of these words have been developed in American decisions implies the administration of law according to the established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing.

**THE LAW OF THE STATE OF CALIFORNIA RELATING TO CONSTRUCTIVE OR SUBSTITUTED SERVICE OF PROCESS.**

The Statutes governing the service of process in civil actions in the State of California are found in the Code of Civil Procedure of that state, and they are as follows:

> "Sec. 411. The Summons must be served by delivering a copy thereof, as follows:
>
> "1. If a suit is against a corporation formed under the laws of this state; to the president or other head of the corporation, secretary, cashier, or managing agent thereof.
>
> "2. If the suit is against a foreign corporation, or a non-resident joint-stock company or association, doing business and having a managing or business

agent, cashier, or secretary within this state; to such agent, cashier, or secretary.

"3. If against a minor, under the age of fourteen years, residing within this state; to such minor, personally, and also to his father, mother, or guardian; or if there be none within the state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

"4. If against a person residing within this state who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed; to such person, and also to his guardian.

"5. If against a county, city or town: to the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof.

"6. *In all other cases, to the defendant personally.*

"Sec. 412. Where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; or is a foreign corporation having no managing or business agent, cashier or secretary within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file herein, that it is an action which relates to or the subject of which is real or personal property in this state, in which such person defendant or foreign corporation defendant has or claims a lien

or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such court or judge may make an order that the service be made by the publication of the summons, provided that where service is sought to be made upon a person who cannot, after due diligence, be found within the State it must first appear to the court by the affidavit aforesaid that there has not been filed, on behalf of such person, in the county where such action is pending, the certificate of residence provided for by section one thousand one hundred and sixty-three of the Civil Code in the county in which the action is brought; or that said certificate was so filed and that the defendant cannot be found at the place named in said certificate, which latter fact must be made to appear by the certificate of the sheriff of the county wherein said defendant claims residence in and by said certificate of residence, and which certificate of said sheriff must show that service of said summons was attempted upon said defendant at the place named in said certificate of residence but that said defendant was not to be found thereat.

"Sec. 413. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months. In case of publication, where the residence of a non-resident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equiva-

lent to publication and deposit in the post-office, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication."

There are no other statutory provisions governing or regulating the service of process in actions to quiet title, save and excepting those quoted above.

**THE AFFIDAVIT UNDER CONSIDERATION HEREIN, AND UPON WHICH SUBSTITUTED SERVICE WAS OBTAINED.**

The Affidavit which is the basis of the jurisdiction of the Superior Court of the County of San Diego to order substituted service in this action was made by the Plaintiff, and is as follows:

" (Title of Court and Cause.)

"AFFIDAVIT OF PUBLICATION OF SUMMONS.

"State of California,

"County of San Diego, ss:

"S. L. Roberts being duly sworn says that he is the plaintiff in the above entitled action; and that the complaint in said action was filed with the Clerk of said Court on the 3rd day of April, 1897, and summons thereupon issued; that said summons has been returned by the sheriff indorsed that he could not find the defendants, or either of them, in his County; that said action is brought to quiet title to the West one-half of the Southwest quarter of the Southeast quarter of Pueblo Lot E of the Pueblo Lands of the City of San Diego, situated in the City of San Diego, County of San Diego, State of California; that this affiant is the owner in fee, and is in the possession of said premises, and that the defendants claim some interest in said property, which said claim is without

any right whatever; that said defendants, or either of them, have no estate, right, title or interest whatever in said lands or premises or any part thereof. That the cause of action is fully set forth in his verified complaint on file herein; that said defendants, or either or any of them, after due diligence, cannot be found within this State, and this affiant, in support thereof, states the following facts and circumstances:

"That affiant, for the purpose of finding said defendants and ascertaining their place of residence, has made due and diligent inquiry of the old residents of the City of San Diego, the former neighbors of said defendants, and is informed by D. Choate, who has lived in the City of San Diego over twenty-five years, that he thinks the defendants are not within the State of California, and he does not know of their residence and has not heard anything of them, or either of them, or of their residence or postoffice address, for more than twenty years; and this affiant is informed by George W. Hazzard, who has lived in San Diego for over twenty-five years, that he has no knowledge as to the whereabouts of the said defendants, or either of them. Plaintiff also made inquiry of Ed. Dougherty, who is an old resident of San Diego, and said Ed. Dougherty informed plaintiff that he did not know the address or residence or where the defendants, or either of them, could be found, and did not believe that they were in the State. Plaintiff also made inquiry of E. E. Shaffer, County Auditor; John F. Forward, County Recorder; J. W. Thompson, County Treasurer; W. J. Cornell, County Tax Collector; John P. Burt, County Assessor; Frank S. Jennings, County Sheriff; Will H. Holcomb, County Clerk of San Diego County; and George D. Goldman, City Clerk; L. F. Doolittle, City Attorney; T. J. Dowell, City Tax Collector and Treasurer; Nat. R. Titus, City Assessor and Auditor; and R. V. Dodge, Post-

master of the City of San Diego; and all of these gentlemen stated to affiant that they did not know the residence of the defendants, or either of them, their Post-office address or where they could be found; and none of the above-named parties had heard of the post-office address or residence of the defendants, or either of them, since they have resided in the said City of San Diego.

"The affiant has made other diligent inquiry to find said defendants, or either or any of them, and has not been able to find them, or any of them within———. The affiant has no knowledge of the residence or post-office address of the defendants or either of them, or where the defendants, or either of them, could be found. This affiant, therefore, says that personal service of said summons cannot be made on the defendant, Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, or either or any of them.

"Wherefore, the affiant prays for an order that service of summons in this case may be made by publication thereof upon said defendants.

"(Signed) S. L. ROBERTS.

"Subscribed in my presence and sworn to before me, this 5th day of April, 1897."

(Seal) C. F. HOLLAND,
*Notary Public.*"

Upon the filing of this Affidavit the Court made an order for publication of process, of which the material part thereof was as follows:

"Upon reading and filing the Affidavit of S. L. Roberts, and it satisfactorily appearing therefrom that the Defendants, Thomas E. Jacob, * * * and Frank Hobson, or either of them, cannot, after due diligence *be found within this State,* * * * * * * it is

> ordered that service of the summons in this action be made upon the defendants (naming them) by publication thereof in the San Diegan Sun, a newspaper published in said County of San Diego,..... is hereby designated as the newspaper most likely to give notice to said defendants; that said publication be made at least once a week for two months."

**'DUE PROCESS OF LAW', AS DEFINED BY THIS COURT AND OTHER AUTHORITIES, AND ITS APPLICATION TO THE CASE AT BAR.**

To constitute due process of law there must be a regular course of judicial proceeding, which means that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. As was well said by Mr. Justice Field, in *Galpin vs. Page*, 18 Wall, Page 350,

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in Court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Daniel Webster in his speech in the Dartmouth College cases gave a lucid definition of the term, 'due process of law,' when he said:

> "By the law of the land is most clearly intended the general law,—a law which hears before it condemns; which proceeds upon inquiry and renders

> judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which goven society."

Professor McGehee in his work on "Due Process of Law Under the Federal Constitution", at Page 73, says:

> "Justice requires that a hearing and an opporttunity to present defense must precede condemnation. Around this ideal of justice has grown up the constitutional conception of 'the law of the land' or 'due process of law'; but the ideal was not confined to one system of jurisprudence and was common to thoughtful men everywhere."

The clauses in our Constitution guaranteeing 'the law of the land' and 'due process of law' have always been held to include the opportunity to present any defenses which might affect the decision of the Court or tribunal. The opportunity to defend implies notice of an official inquiry into the facts, and *notice and hearing* are necessary to 'due process of law',—are indeed the *essential elements thereof.*

*Simon* vs. *Craft,* 182 U. S., 436;

*Hooker* vs. *Los Angeles,* 188 U. S., 314-318;

*Wilson* vs. *Standefer,* 184 U. S., 399-415.

The Statutes of the State of California as we interpret them provide that in every case where the Defendant is a resident of that state he *must be personally servd* with process, and that no substituted service of process can be made upon him *until it is judicially determined* UPON COMPETENT EVIDENCE *that he cannot be found within that State,* and that where such substituted service

is to be made beyond the borders of the State *he must be given notice by mail*, if his place of residence can, with due diligence, be found, and that anything less than such service is not a regular course of judicial proceeding, and any judgment rendered upon such service is a judgment rendered without legal notice,—is a judgment rendered without an opportunity to be heard,—is without the jurisdiction of the Court, and is therefore void. 'Due process of law' requires, and the Statute requires, that there should be personal service of process in all cases *where it is practicable* to obtain such service. In cases of non-residents, personal service of judicial process cannot be obtained, and in cases of residents who have departed from the state, or persons who cannot, after due diligence, be found within the state, or persons who conceal themselves to avoid the service of process, personal service is not practicable; but the substituted service provided by the Statute must be of such a character that it will be *reasonably probable that the party sued will be apprised of the pendency of the action and afforded an opportunity to make his defense.*

For the proper ascertainment of the legislative intent in a Statute which authorizes substituted service of judicial process, we must study the system in light of those circumstances and conditions which must exist before a resort may be had to such substituted service. Substituted service of judicial process is only authorized by reason of the *necessity* of the particular case, and because it is im-

possible and impracticable to obtain actual service, and when so authorized the substituted service provided for in the Statute must be of such a character that it will be *reasonably probable* that the party whose property is placed in jeopardy will be apprised of the pendency of the action and will be afforded a *reasonable opportunity* to appear therein and make his defense. The Statutes of the State of California require that there shall be personal service in all cases where it is practicable, or possible to make such service, and that before any substituted service is authorized, it must appear beyond question that it is neither practicable nor possible to make such personal service.

In Cooley's "Constitutional Limitations," at Page 404, Judge Cooley, in discussing the power of the Legislature to provide by Statute for substituted service of judicial process, makes the following observations:

> "Substituted service is generally in the form of a notice, published in the public journals or posted, as the Statute may direct, the mode being chosen with a view to bring it, *if possible,* home to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the Legislature to prescribe such notice and to give it effect as process, rests upon *the necessity of the case.*"

In *Arndt* vs. *Griggs,* 134 U. S. 321, Mr. Justice Brewer in rendering the decision of this Court in that case says:

> "It (the state) cannot bring the person of a non-resident within its limits,—its process goes not out beyond its borders—but it may determine the ex-

> tent of his title to real estate within its limits; and for the purpose of such determination may provide any *reasonable method* of imparting notice; and no proceeding which it provides can be declared invalid, unless in conflict with some special *inhibitions of the constitution, or against natural justice.*"

In *Pennoyer* vs. *Neff,* 95 U. S. 737, Mr. Justice Hunt, delivering the opinion of this Court, and therein discussing the question of substituted service of judicial process, says:

> "It belongs to the legislative power of the state to determine what shall be the modes and means proper to be adopted to give notice to an absent defendant of the commencement of a suit; and if they are such as are *reasonably likely to communicate to him information of the proceeding against him, and are in good faith designed to give him such information,* and an opportunity to defend is provided for him in the event of his appearance in the suit, it is not competent to the judiciary to declare that such proceeding is void as not being by due process of law."

In *Hagar* vs. *Reclamation District,* 111 U. S., 708, Mr. Justice Field in delivering the opinion of this Court, discussing this question, says:

> "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, *it must give them an opportunity to be heard* respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the depriva-

> tion of either, without the observation of those general rules established in our system of jurisprudence for the security of private rights. Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected *shall have notice* and an opportunity to be heard; so also, where title or possession of property is involved."

In *Holden* vs. *Hardy,* 169 U. S., 389, Mr. Justice Brown in rendering the decision of this Court in that case and discussing the question as to 'due process of law' employed the following language:

> "This Court has never attempted to define with precision the words 'due process of law', nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property *without due notice* and an opportunity of being heard in his defense."

In *State* vs. *Guilbert,* 47 N. E., 557, wherein the Supreme Court of Ohio discussed the subject of substituted service, Mr. Justice Shauck used the following language:

> "That the Legislature may provide for a substitued service of judicial process when it is required by *necessity* is not doubted. If, in a suit to adjudicate the rights of persons in property within the state, a defendant resides without the state, such necessity is apparent, for the process of the state has no efficacy beyond its borders. Other cases *of necessity* are recognized. The principal is that the state may provide for the adjudication of all adversary rights of per-

> sons in property within its borders, and, to the end that such jurisdiction may be complete the Legislature may provide a substituted service of process for cases in which *actual service cannot be made.* In such case nothing more is required by the law of the land than that the substituted service shall be such as, in the exercise of legislative discretion, shall be found *most apt to accomplish the purposes of actual service.*"

In *Shepherd* vs. *Ware,* 48 N. W. 774, Mr. Justice Vanderburgh, speaking for that Court in discussing the question of substituted service, made the following observations:

> "Under the Constitution, legal proceedings in the Courts are under the direction of the Legislature, subject, of course, to the fundamental provisions of the bill of rights. But the guaranty of due process of the law does not necessarily require personal service of notice upon parties, resident or non-resident. The Legislature may, in its discretion, provide for substituted service *in case of necessity,* or where personal notice is for any reason *impracticable,* in an action where the controversy relates to property within the jurisdiction of the Court, and with the reasonable exercise of such legislative discretion the courts will not assume to interfere."

In *Happy* vs. *Mosher,* 48 N. Y., 317, the Court of Appeals of the State of New York in discussing 'due process of law' and substituted service therein says:

> "An approved definition of due process of law is 'Law in its regular course of administration through Courts of Justice.' (2 Kent. Com. 13). It need not be a legal proceeding according to the course of the

common law; neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is *reasonably probable* that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend. It matters not that it may be difficult for him to defend under the law, so long as it is not impracticable for him to do so by the use of such reasonable efforts as the owners of property may generally be supposed to be capable of. His opportunity to defend, however, must not be merely colorable and illusory. This Statute provides for notice of the proceeding by publication, under such circumstances that it is *reasonably certain* that the opposite party would be apprised of the claim made against him."

In *Burton* vs. *Platter*, 53 Federal, 903, Judge Sanborn speaking for that Court, makes the following remarks on the subject of due process of law:

"It is a principle that lies at the foundation of all just government that no man shall be deprived of his life, liberty or property without due process of law. Every disregard of this principle by courts, legislatures, or citizens, tends directly towards distrust, insecurity, disorder and anarchy. It may be difficult, perhaps impracticable, to give a definition of 'due process of law,' which would comprehend all cases as they arise, and it is certainly unnecessary to do so. Chancellor Kent says: 'The better and larger definition of 'due process of law' is that it means law in its regular administration through courts of justice.' (2 Kent. Com. 12). Certain it is that, in judicial proceedings, due process of law must be a course of legal proceedings, according to these rules and forms which have been established for the protection of private

> rights. It must be one that is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary manner prescribed by law. It must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. *It must be one which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial.*"

In *Roller* vs. *Holly*, 176 U. S., 402, Mr. Justice Brown, speaking for this Court makes the following observations on the subject of due process of law and its bearing upon the question of substituted service:

> "The question in dispute, then, is whether a notice served upon the plaintiff in Rockingham County, Virginia, December 30, 1890, to appear in Limestone County, Texas, on January 5, 1891, to answer the foreclosure suit, is due process of law within the meaning of the Fourteenth Amendment? It is true (p. 408) that, by Articles 1280 and 1281, the case could not have been called for trial or default until the 5th day of the term, January 9, and that Roller's default was not actually taken and judgment entered until that day. But, as a citizen of Virginia, he was not bound to know the practice of the Texas Courts in that particular, and was at liberty, even if he were not compelled, to construe the notice as it reads upon its face. Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion. That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to

which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirements of notice would be of no value whatever unless such notice were *reasonable and adequate for the purpose.*) (*Davidson* vs. *New Orleans,* 96 U. S. 97. *Hager* vs. *Reclamation District,* 111 U. S., 701-712). Without undertaking (p. 413) to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice or due process of law; that the judgment obtained upon such notice was not binding upon the Defendant Roller, and constitutes no bar to the prosecution of this action."

In *De La Montanya* vs. *De La Montanya,* 112 Cal., 109, Mr. Justice Temple in discussing the validity of substituted service, speaking for the Supreme Court of the State of California, said:

"The question there is simply whether a defendant had *such reasonable opportunity to be heard* as will constitute due process of law. The question there is *always* whether there has been *due process*; whether the defendant has had a reasonable opportunity to be heard."

It will be seen from the foregoing citations that the Legislature of a state has the constitutional power to provide for the substituted service of process in actions brought to quiet title to real property within the jurisdiction of a state court, in lieu of, or as a substitute for, personal service of such process in those cases where it is impracticable or

impossible to obtain actual personal service of summons. It is perfectly apparent, however, from the case above cited that the Legislatiure can provide for such substitute of judicial process *only* when the *necessity* of the particular case requires such substituted service and it will also be seen from the same authorities that the provisions so made for constructive notice of substituted service *must not be against natural justice,* or in conflict with the provisions of the Federal Constitution prohibiting a state from depriving any person of their property without due process of law,—that is to say, that the constructive notice or substituted service so provided for must be of such a character *that it will be reasonably probable* that the party against whom the action is connected *will be apprised* of the pendency thereof and will be afforded an ample opportunity to make his defense, if any he have. *Constructive notice or substituted service which is not calculated to accomplish that purpose will be subversive of all natural right and justice and should not receive judicial sanction.*

**THERE IS A FEDERAL QUESTION INVOLVED HEREIN WHICH WAS PROPERLY RAISED IN THE COURT BELOW, AND IS PROPERLY PRESENTED HEREIN.**

The Motion of the Court below to vacate, set aside and declare void the proceedings and judgment involved herein was made upon the ground:

> "That said Judgment was rendered and entered in a proceeding and constituted a proceeding,**** which did, and does, violate Section 1, Article XIV of

the Constitution of the United States, in, that it did, and does, deprive these defendants******of their property without due process of law."

(Transcript Page 12.)

And on the further ground:

"That the proceeding for the publication of Summons against these Defendants, did not, and does not, comply with the laws of the State of California, and did not, and does not, constitute due process of law, and did, and does, deprive these defendants, and each of them, of their property without due process of law and in contravention of Section 1, Article XIV of the Constitution of the United States of America, because and for the reason that no satisfactory evidence was produced before said Court or a Judge thereof which establishes as a fact, or tended to establish as a fact, that these Defendants, or either of them, could not have been found within the State of California and therein personally served with process, had due diligence, and such diligence as is required by the laws of said State, been used by the Plaintiff to find these Defendants, or either of them, within the State of California."

(Transcript Page 14.)

And the Order of the Court vacating said Judgment was as follows:

"That said Judgment was and is a proceeding which did and does deprive the said defendants of their property without due process of law, and did and does violate Section 1, Article XIV of the Constitution of the United States."

(Transcript Page 12.)

And the Federal Question so presented to the trial court

was passed upon on the Appeal from said Order by the Supreme Court of the State of California, Mr. Justice Henshaw saying, in speaking of that Court:

> "It is substantially conceded by Respondent that to uphold the Judgment of the trial Court, we must reverse the decision of *Rue* vs. *Quinn*, 137 Cal., 651, ****. Respondent urges that we should do this upon the ground that the decision violates the familiar Section 1, Article XIV of the Constitution of the United States, and that this Federal Ouestion was not considered by the Court in rendering its decision. Herein Respondent is in error. Every case where question arises of the sufficiency of substituted process necessarily embraces the proposition as to whether or not there has been due process of law. The provisions of the Constitution of the United States does not differ in this respect from that found in Article 1, Section XIII of our own Constitution. Since the case of *Pennoyer* vs. *Neff*, 95, U. S., 137, every case upon this subject matter has been decided with direct reference, either express or necessarily implied, to these Constitutional provisions."
>
> (Transcript P. 27.)

In *Pennoyer* vs. *Neff*, 95, U. S., 137, Mr. Justice Field in speaking of what constitutes due process of law, and whether or not a Federal Question is involved herein, said:

> "Since the adoption of the Fourteenth Amendment to the Federal Constitution, th validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a Court of Justice to determine the personal rights and obligations of parties on whom

the Court has no jurisdiction do not constitute due process of law."

The Court must always look beyond the form of the question presented to its substance to determine whether an essential due process is involved; thus—the reasonableness of a notice required under a State Statute involves a vital element of due process, and the decision of a State Court on this question is not binding on the Federal Court.

(*McGehee* on "Due Process of Law," Page 39.)

In *Scott* vs. *McNeal,* 154 U. S., Page 34, Mr. Justice Gray says:

"The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte Virginia* (*"Virginia* vs. *Rives"*) 100 U. S., 313, 318, 319, (25: 667, 669); *Ex parte Virginia,* 100 U. S., 339, 346, (25:676, 679); *Neal* vs. *Delaware,* 103, U. S. 370, 397, (26: 567, 574). And the first one, as said by Chief Justice Waite in *United States* vs. *Cruickshank,* 92, U. S., 542, 554, (23: 588, 592), repeating the words of Mr. Justice Johnson in *Bank of Columbia* vs. *Okely,* 17 U. S. 4 Wheat. 235, 244 (4: 559, 561); was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

"Upon a Writ of Error to review the judgment of the highest Court of a State upon the ground that the Judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that court's construction of a Statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liablity created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this Court must decide for itself the true construction of the statute. *Huntington* vs. *Attrill*, 146 U. S., 657, 683, 684, (36: 1123, 1133); *Mobile & O. R. Co.* vs. *Tennessee, ante*, p 793."

"No Judgment of a Court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

In *Galpin* vs. *Page*, 18 Wallace, Page 368, Mr. Justice Field, speaking for that Court, says:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

"When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person

of an absent party, not a citizen of the State nor found within it, every principal of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the Courts of every State in the Union. It has been so held by the Supreme Court of California in repeated instances. In *Jordan* vs. *Giblin* (12, California, 100), decided in 1859, service of publication was attempted, and the Court said that it had already held, in proceedings of this character, where service is attempted in modes different from the course of the common law, that the Statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression.' In *Ricketson* vs. *Richardson*, (26 Cal. 149), decided in 1864, the Court, referring to the sections of the Statute authorizing service by publication, said: 'These sections are in derogation of the common law, and must be strictly pursued in order to give the court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance.' In *McMinn* vs. *Whelan*, (27 Cal. 300), decided in 1866, the Plaintiff in ejectment traced his title from one Maume. The defendants endeavored to show that the title had passed to one of them under a previous judgment against Maume. This Judgment was recovered against Maume and others, who were non-residents of the State, upon service of summons by publication. It appeared from the record that a supplemental complaint had been filed in the action and that the summons published was issued upon the original Complaint, and not after that had been superceded by the supplemental complaint. It was objected that the publication thus made was insufficient to give the Court jurisdiction of the person of the absent defendants; the objection was answered by the position that the

judgment could not be questioned collaterally for the reason that the jurisdiction of a court of general or superior jurisdiction would be presumed, in the absence of evidence on the face of the record to the contrary. But the Court held the objection well taken, and after referring to the case of *Peacock* vs. *Bell*, in Saunders, said that that case 'involved the question of jurisdiction as to the subject matter of the action and not as to the person of the defendant, and it may be doubted if a case can be found which sanctions any intendment of jurisdiction over the person of the defendant when the same is to be acquired by a special statutory mode without personal service of process. If jurisdiction of the person of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued.' "

To the same effect are the cases of

*Hart* vs. *Sansom*, 110 U. S., 151;
*Cooper* vs. *Newell*, 137, U. S., 555;
*Mallett* vs. *State*, 181 U. S., 589;
*Belcher* vs. *Chambers*, 53 Cal. 635;
*Roller* vs. *Holly*, Supra.

Therefore the Federal Question was properly raised in the trial court. Its decision and action in the premises was based upon the constitutional right of the Plaintiffs in Error, and the Supreme Court in passing upon the question passed upon the Federal Question involved. The Assignment of Error specifically raised the question and it is within the jurisdiction of this Court to here consider and determine the question.

## THE OBJECT OF THE STATUTE.

The Hon. E. S. Torrance, the Judge who made the Order in the Lower Court, filed a written opinion therein and in such opinion he made this lucid explanation of the object of a Statute for substituted service,

> "The object of the statute is manifest, whether we look for the legislative intent in the words of the statute itself, or whether we seek for such intent in view of the general principles of constitutional law which justify the legislature in providing for substituted service of judicial process. The plain object of the statute is to provide for substituted service in those cases only where actual service is impracticable, and to provide such notice as in each particular case will most likely inform the absent defendant of the pendency of the action against him; and it devolves upon the trial court, or the judge thereof, the judicial responsibility of determining where the summons shall be published; how long it shall be published; and whether notice shall also be given through the United States mail; which judicial discretion must be called into exercise and directed and controlled solely by the facts and circumstances appearing in the affidavit in each particular case. If the defendant is known by the plaintiff to be within the state, or if the plaintiff can find the defendant within the state after the exercise of due diligence, actual service of summons must be made upon him. If the defendant resides out of or is absent from the state, and his residence is known to the plaintiff, he is entitled, in addition to the publication of the summons, to such actual notice as he may receive by the mailing of a copy of the summons and the complaint directed to him at his place of residence. The evidence upon which the court or judge acts in directing substituted service must be

contained in the affidavit upon which the order is made. The court or judge cannot indulge in speculation or conjecture whether, in a particular case, the plaintiff knows, or does not know, that the defendant resides in, or is present within the state; or whether the plaintiff knows, or does not know, whether the defendant resides out of, or is absent from, the state. The court or judge can draw no inference as to the knowledge that the plaintiff may have as to the residence or whereabouts of the defendant except such as is justified by the evidence contained in the affidavit. Facts, therefore, must be shown by the affidavit which necessarily exclude the presumption that the defendant (whether he be within the state or a non-resident of or without the state) is entitled to the actual notice required by the statute."

**WHAT MUST BE SHOWN BY THE AFFIDAVIT BEFORE THE COURT ACQUIRES JURISDICTION TO MAKE AN ORDER FOR SUBSTITUTED SERVICE.**

When an application is made to a Court or to a Judge for an Order for substituted service of process five essential matters must be determined from the evidence furnishd the Court or Judge by the Affidavit or Affidavits presented in support of the application.

First. The lack of knowledge on the part of the Plaintiff that the Defendant is personally present within the State, otherwise the Plaintiff must resort to actual service of process.

Second. The existence of one of the statutory grounds for substituted service.

Third. The kind of substituted service to be ordered,

whether by publication alone, or whether by publication and the deposit of a copy of the Summons and Complaint in the Post Office directed to the person to be served at his place of residence.

Fourth. The designation of the newspaper in which the publication is to be made, namely:—the newspaper which will be most likely to give notice to the person to be served.

Fifth. The length of time that the publication shall be continued in the designated newspaper.

All of these matters must be determined by the exercise of a sound discretion of the Court, or Judge, solely upon the facts and circumstances disclosed by the affidavit or affidivits presented. The designation of the newspaper which will most likely give notice to the Defendant, and the length of time that the publication shall continue, must necessarily depend upon the residence of the defendant, or at least his probable whereabouts, unless it is disclosed by the affidavit of the plaintiff that he has no knowledge upon that subject, and that he has exercised due diligence to inform himself.

**WHAT THE STATUTE REQUIRES, AND WHAT THE AFFIDAVIT SHOWS.**

The Statute requires that due diligence be exercised to find the Defendant in the entire State of California, not in a small portion thereof.

The Affidavit shows that no effort whatever was made to find the Defendants in any other part of the State of California, save and excepting in the County of San Diego;

the Sheriff's Return shows that he made a *two days'* search in the County of San Diego, and the Affdavit of S. L. Roberts shows that he made a *two days'* search in the City of San Diego, and made inquiry of fifteen people residing therein, and that no other or further inquiry was made.

There is nothing stated in the Affidavit why the inquiry was made in the County of San Diego, and there is nothing stated as to why no inquiry was made elsewhere.

Let us analyze the Affidavit under consideration. Stripping it of all technical phraseology, we find in it the following statements and none other:

> "I am the plaintiff in the above entitled action."
>
> "*Two days ago* I placed the summons in this action in the hands of the Sheriff to serve the defendants, and he returned it to me with the statement that he could not find said defendants in the County of San Diego."
>
> "I have made due diligent inquiry of the *Old Residents of the City of San Diego,* the former neighbors of said Defendants."

Who these old neighbors are, or who these old residents are, affiant fails to state. He proceeds:

> "Affiant is informed by D. Choate, who has lived in the City of San Diego over twenty-five years, that he thinks the defendants are not within the State of California, *and he does not know of their residence,* and has not heard anything of them, or either of them, or of their residence or postoffice address for more than twenty years."

There is no statement here that Mr. Choate ever knew these parties; that they ever resided in San Diego; that he ever knew their residence; or that there is any reason why inquiry should have been made of him.

> This 'affiant' is informed by George W. Hazard, who has lived in San Diego for over twenty-five years that '*he has no knowledge as to the whereabouts of said defendants or either of them.*'
>
> "Plaintiff also made inquiry of Ed. Dougherty, who is an old resident of San Diego, and said Ed. Dougherty informed Plaintiff that *he did not know* the address or residence or where the defendants, or either of them, could be found, and did not believe they were in the state."
>
> "Affiant also made inquiry of twelve county and city officials (naming them) and *all of the gentlemen stated to affiant that they did not know the residence of the defendants, or either of them, their post-office address, or where they could be found, and none of the above-named parties had heard of the post-office address of the defendants, or either of them, since they had resided in said City of San Diego.*"
>
> "Affiant has made other diligent inquiry to find said defendants and has not been able to find them."
>
> "Affiant has no knowledge of the residence or post-office address of said defendants, or where they can be found."
>
> "Affiant therefore says that summons cannot be personally served upon said defendants or either of them."

It is questionable, in view of the requirement of the statute that the facts be presented by affidavit, whether any

notice whatever can be taken of the Sheriff's Return, but however that may be, it will be noticed that the Sheriff's two days' search for the defendants was *confined exclusively to the County of San Diego.* It will be observed also that the two days' inquiry and search of Mr. Roberts was *confined exclusively to the City of San Diego,* and that his inquiry, such as it was, was made exclusively of residents of that city, and of such officers as are required by law to have their office in and to reside in one particular place, in one particular county.

San Diego County,—while large in its hopes, its ambitions, its expectations,—is but one of fifty-seven counties in the State of California. Its geographical area is but 499-1000 of the area of the State. Its population is but 236-10,000 of the population of the state.

The Statute requires due diligence to be exercised to find the defendants IN THE STATE, not in an area of less than one-twentieth thereof; not in one county thereof. There is not the slightest statement of fact in the affidavit that these defendants, or either of them, ever resided in the County of San Diego,—that any person in the County of San Diego knew where they did reside; that any inquiry made in the County of San Diego would locate them; or, THAT THEY COULD NOT HAVE BEEN FOUND BY THE SLIGHTEST INQUIRY IN THE STATE BEYOND THE BORDERS OF SAN DIEGO COUNTY. No reason is given why the inquiry was made there, and no reason is given why it was confined there.

**FURTHER COMPARISON OF THE AFFIDAVIT WITH THE STATUTORY REQUIREMENTS.**

When we examine the law as to service of process we find at the outset that the statute requires that all service of process *must be personal.* That the process of all courts in this state must be personally delivered to or served upon the party who will be bound by the Judgment sought to be obtained.

There are exceptions to this positive requirement, but all these exceptions are specific and are carefully defined, and are all to be found in Sec. 412, C. C. P., heretofore set out at length, which authorize constructive service to be made only:

First. Where the defendant resides out of the state.

Second. Where he has departed from the state.

Third. Where he cannot, after due diligence, be found within the state.

Fourth. Where he conceals himself to avoid service.

Fifth. When the defendant is a foreign corporation, having no officer in this state upon whom service may be made.

Before any one or more of these exceptions can be invoked or exercised, and before the Court has jurisdiction to authorize such substituted service, *the existence of the exception must be made to appear by an affidavit to the satisfaction of the Court.* This is a condition precedent. A jurisdictional pre-requisite. We say it must appear by affidavit because the statute gives no other way of making

it appear, and restricts the manner of bringing to the judicial notice of the Judge or Court the facts upon which to base substituted service to the affidavit. Therefore, in testing the jurisdiction of the Court to order substituted service, we are necessarily confined exclusively to the affidavit upon which substituted service was ordered, and to the facts which it contains. The Statute further requires that where the residence of the defendant is known or can be ascertained, that in addition to publication, there must be a service by mail, so that even where substituted service is made, the law requires a personal delivery of the process to the defendant beyond the confiines of the state.

In this case substituted service was obtained solely upon the ground that these Respondents could not, after due diligence, be found within this State. Therefore, it must appear from the affidavit in the record as a matter of fact and as a matter of law that the Defendants could not, after due diligence, be found within the State of California. It matters not what the record, aside from the Affidavit, might show; it matters not what personal knowledge the Judge might have had; it matters not what personal knowledge the Plaintiff might have had; it matters not what knowledge any man, woman, or child, in the State of California might have had;—the sole measure of the power and jurisdiction of the Court in the premises depends upon the facts legally brought to the judicial notice of the Judge or Court by the affidavit presented. The Statute says:

*"And the fact appears by affidavit to the satisfac-*

*tion of the court or a judge thereof" that "the person on whom service is to be made cannot, after due diligence, be found within the state."*

Does this mean that the question is one which depends upon the whim, caprice or willingness of the judicial officer who is called upon to exercise a judicial power? Manifestly not! It means a sound judicial discretion exercised in the light of the law.

Sec. 2061., Code of Civil Procedure of the State of California, provides:

> "The power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence."

What does the phrase *"appears to the satisfaction of"* mean? Does it mean a personal satisfaction? The personal view of the Judge upon the question? Manifestly not! It means when the fact is established by legal evidence. This is the answer of Sec. 1835 of the Code of Civil Procedure of the State of California, which provides:

> "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. SUCH EVIDENCE ALONE WILL JUSTIFY A VERDICT."

*Judicis est jus dicere non dare. Optima est lex quae minimum relinquit arbitrio judicis, optimus judex qui minimum sibi.*

The question therefore is left to a judicial discretion, to be exercised under the rules of evidence prescribed by law for determining questions of fact before a judicial tribunal, and *substituted service can be had only when it is legally*

*shown by satisfactory evidence contained in an affidavit that the necessity exists therefor.* No judge or court has a legal right to be satisfied with less. The application is *ex parte.* The facts stated in the affidavit are to be accepted as true. Nothing is or can be presumed to exist in regard to the matter under consideration, except what is stated in the affidavit. The law invokes the maxim:

*"Quod non apparet, non est."*

Or, as clearly stated by Mr. Justice Sanderson in *Hahn* vs. *Kelly,* 34 Cal. 407, when speaking for the Supreme Court of the State of California,

> "When the record states what was done, it will not be presumed that something different was done."

Or, as stated by Mr. Justice Peckham in *Marx* vs. *Ebner,* 180, U. S., 314:

> "The facts must appear from which it will be a just and reasonable inference that the defendant could not, after due diligence, be found, and that such due diligence has been exercised."

And, as stated by that eminent jurist, Judge Cooley, in *Thompson* vs. *Circuit Judge,* 54 Mich., 237:

> "The affidavit should state facts of inquiry and investigation, so that the Court can see that the conclusion that the party cannot be found for the reason stated is a reasonable one upon such facts."

To the same effect as the above are the decisions of the Supreme Court of the State of California in *Ricketson* vs. *Richardson,* 26 Cal. 149, wherein Mr. Justice Sanderson says:

"In granting the order, the Court or Judge acts judicially and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant.

"There is no other way of bringing the fact of residence to the judicial knowledge of the Court or Judge. That the fact of residence should appear in the affidavit is, therefore, necessarily implied from the whole tenor and scope of the statute.

"Under this construction of the statute, of the soundness of which we have no doubt, it is clear from an inspection of the affidavit and order of publication in this case that neither satisfied its requirements. Under them the Court acquired no jurisdiction over the person of the appellant. Where this kind of service is sought the proceeding should be carefully scrutinized and strict compliance with every condition of the law exacted; otherwise its provisions may lead to gross abuse, and the rights of person and property made to depend upon the elastic consciences of interested parties, rather than the enlightened judgment of a Court or Judge."

And also in *Braly* vs. *Seaman,* 30 Cal., 611, wherein Mr. Justice Curry, voicing the views of that Court, said:

"The mode of obtaining jurisdiction of a defendant by publication of summons is prescribed by the statute. It must appear by affidavit that he resides out of or had departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons. The existence of one of these conditions is not enough. In addition thereto it must also appear by affidavit that a cause of action exists against the defendant in respect to whom the service is to be made, or, that he is a necessary or proper party to the action. (Pr. Act. Sec. 30). It is already settled that the statute providing the mode

for acquiring jurisdiction of a defendant by the publication of summons, being in derogation of the course of the common law, must be strictly followed in order to give the Court jurisdiction over the person of the defendant. (*Ricketson* vs. *Richardson*, 26 Cal. 152; *Jordan* vs. *Giblin*, 12 Cal. 100).

"It does not appear from the affidavit whether the residence of Robert A. Curl was known to the appellant or not; nor does it show that he did not know where such defendant might be found. He states that he had made many inquiries for Robert A. Curl. That he had inquired of all persons whom he thought likely to know him in the City of San Francisco, or elsewhere, to ascertain where he might be found, but had been unable to find any one who had seen him or had heard positively from him for the past eight years. The facts stated do not negative all information on the appellant's part as to where the defendant, Robert A. Curl, might have been found and personally served with the summons; nor does it show that he did not obtain from any one of whom he made inquiries, information of where Curl was; but he deposes that he had been unable to find any one who has seen him or heard from him positively for eight years. The affidavit was clearly insufficient in our judgment to authorize the publication of the Summons. We are of the opinion the mode adopted for acquiring jurisdiction of the person of Robert A. Curl failed of its object, and that the judgment rendered and entered against him was *coram non judice* and void."

There cannot be two standards by which to measure the legal sufficiency of an affidavit. The facts stated confer jurisdiction or they do not. If they do, then they are sufficient for every judge in this state. If they do not, then they are not sufficient for any. If the inquiry made in only

one county in the state, viz:—the County of San Diego, as shown by this affidavit, constitutes due diligence to find the defendants in the State of California, then a similar inquiry made in any other one county in the state would constitute due diligence. A judgment which was based upon a complaint which failed to state a cause of action could never be upheld because facts were stated which tended to show a cause of action. The law demands probative facts which support the ultimate fact, not something which only tends to support it, which attempts, but fails to do that.

Due diligence is, and always must be, a relative term. What is due diligence must be determined in the light of the peculiar conditions existing in each case, and the scope of knowledge which the person making the affidavit has of such conditions.

*But the Court cannot pass upon these conditions or the degree of knowledge unless the conditions and the manner of knowledge and the facts are stated in the affidavit presented to the Court in such a way that they pass under the judicial eye of the Court.*

As before stated, the Court can know nothing of the conditions as to where the search should be made or how the search should be made, unless these things are set out in the affidavit.

*"Quod non apparet, non est."*

## FURTHER REASONS WHY THE AFFIDAVIT IS INSUFFICIENT TO CONFER JURISDICTION TO ORDER SUBSTITUTED SERVICE

To state a cause of action in an action to quiet title, the Plaintiff must allege under oath that the defendant ASSERTS AN ADVERSE RIGHT IN PLAINTIFF'S LAND. How did the Defendant assert such right? If Plaintiff knows and can swear that the Defendants assert such a right, he perforce must have knowledge of the defendant, his whereabouts and how he can be found. The facts and circumstances surrounding the asserting of that adverse right would show how it was asserted, when it was asserted, where it was asserted and to whom it was asserted. These are the factors which would enlighten the Court upon where a search should be made, of whom inquiry should be made, and what would constitute due diligence in the particular case. But upon all these questions, as well as upon every essential fact necessary to be shown, there is a silence in the affidavit in the record as profound as the darkness before the dawn of creation.

The Plaintiff alleges in his Complaint and verifies it that these Respondents assert some right, title or interest in or to the premises described in the Complaint adverse to him. How did they assert it? The record is silent. When did they assert it? The record is silent. Where did they assert it? The record is silent.

They could only assert it by one or more of the following means:

By taking possession of the land.

By claiming it by word of mouth.

By posting some notice upon it or in its vicinity.

By publication of such claim in some newspaper.

By filing some instrument in the office of some public official.

When we examine the affidavit in this case we find that *no search was made on or about the land* for these defendants, or either of them. If they were in possession, either in person or by agent, such inquiry would have disclosed their place of residence.

If the assertion of title was made by word of mouth, no inquiry was made of the parties to whom such assertion of title was made as to where the defendants could be found.

Did these defendants assert title by posting of some notice upon the land in its vicinity, or by publication? If so, when, where and how? How were the notices posted? Who made the publication? Where was it made? The record shows no search in these matters.

If the claim was asserted by some instrument filed. Who filed it? When was it filed? Where was it filed? With what officer? The record presents that silence which brooded over chaos.

It is true that inquiry was made of twelve city and county officers, but not one of these officers is, by virtue of his office, or by law, or at all, a bureau of intelligence as to the residence of people, nor are they in any manner charged

with the keeping account of the residence of persons in their respective counties. Being elective officers, there might be a slight inference that they had an extended acquaintance throughout their county, and that perchance the defendants might have had some official business with them to cause a disclosure of their places of residence, but aside from this slight inference, there is nothing in the Affidavit to show that these officers, or any one of them, or all of them, were persons any more likely to know the residence of the defendants than the first ten or twelve men which Affiant might have met while walking along the street. Every inference, strong as it is, might be construed as to the official knowledge of these officers,—would be limited to their own county, *and is not co-extensive with the state.* The inquiry so made was after the Sheriff had reported that these defendants could not be found within the County of San Diego.

The affidavit attempts to show that inquiry was made of the County Recorder for the whereabouts of these Defendants, but it does not appear therefrom that any examination was made, either by the Affiant or by the Recorder, or by anyone else, of any document, instrument or record in the Recorder's Office, to ascertain the residence of the defendants, or either of them.

The same can be said as to all the inquiries made of the other officers.

Due diligence to find a defendant *means that inquiry should be made of those who know or who would be most*

*likely to know, or who are in a position to know* the residence of the parties sought for. Every person of whom inquiry was made in this case stated positively to Affiant that *they did not know*, and except in the case of D. Choate all of them stated positively that THEY NEVER HAD KNOWN.

Of the people inquired of, D. Choate said that he did not know, and had not heard, of them for more than twenty years; George W. Hazzard stated that he did not know and never had known; Ed. Dougherty said that he did not know; and each of the twelve officials stated that they did not know and never had known where the defendants resided.

Therefore, the total of the due diligence exercised in this case was inquiry made of fifteen people residing in one city in the state, ALL OF WHOM STATED THAT THEY DID NOT KNOW ANYTHING AT ALL ABOUT THE DEFENDANTS. No reason is given why any inquiry was made of these fifteen people, except the fact that the fifteen resided in the City of San Diego, and three of them were old residents of that city.

There is not one single fact stated in the record which differentiates this action to quiet title from any other action to quiet title. If the search made in this action to find the defendants constitutes due diligence and is sufficient, then it must be sufficient in every other action of a like nature. There cannot be any two standards by which to measure the legal sufficiency of an affidavit. The

facts stated confer jurisdiction, or they do not. If they do state such facts, then they are sufficient for every judge in the State of California. If they are not sufficient for every judge in this state, then they are insufficient here. If the Judge had a legal right to order substituted service upon Mr. Robert's affidavit, then every other Judge in this state *must be legally satisfied with the same character of an affidavit*. If inquiry of three private citizens and twelve city and county officials in the City of San Diego, who know nothing at all of the defendants, and so state, is a sufficient search to constitute due diligence to find a defendant in the state, then a similar inquiry of the same number of equally ignorant people of the County of Siskiyou, or the County of Nevada, or the County of Los Angeles, is sufficient.

Inquiry from a large number of people *does not constitute due diligence*. There is more diligence exercised in making the proper inquiry of one person who does know, or who is in a position to know, or who is most likely to know the whereabouts of a defendant, than there is in making inquiry of a thousand people who do not know, who have no especial means of knowing, and who are not likely to know. *Inquiry of one business associate, one relative, one agent*, would be of far more value than inquiry of *the entire population* of the City of San Diego.

Why was inquiry made in the City of San Diego at all? The record is silent. Why was the inquiry confined to the City of San Diego? The record is silent. Why was in-

quiry made of D. Choate, of George W. Hazzard, of Ed. Dougherty? The record is silent, except that they were old residents of the City of San Diego. Why was inquiry made of the twelve county and city officials? The record is silent. Shall we assume that the inquiry was made there because the land is situated in that county? Is there any presumption of law, or any presumption of fact, that the owner of a parcel of land resides in the city, or in the county, where the land is situated? Manifestly not! Ah! But Appellant would say:—The owner should have an agent or somebody in charge of his land in that city or county. That is a logical answer to the question. THEN WHY WAS NOT INQUIRY MADE OF THAT AGENT? WHY WAS NOT INQUIRY MADE ON OR ABOUT THE LAND?

As we stated at the outset, the statutes of this state require that the service of process must be personal. The policy of the statute is against snap judgments or judgments by default. The law contemplates that the defendant, in every case where possible, must be personally served, and that substituted service can only be used where, by reason of jurisdictional limitation, or positive failure to find a defendant, such service of process is necessary. The statute never contemplated that a plaintiff could file a Complaint, place the Summons in the hands of the Sheriff of a county for service, let it remain there *two days*, then make inquiry of fifteen persons residing *in one town*, who state positively that they do not know anything about the

defendants, and upon such a showing procure a Judgment upon substituted service against the owners of property *in the State of California.* Property rights are too sacred to be thus placed at the mercy of a careless judicial officer and a willing affidavit maker. There are five defendants in this case. Is it possible—could it be possible—that where a *bona fide* search was made to find five different defendants that the facts and circumstances which would constitute due diligence could be, or would be, the same *as to each* of the five defendants? That the same search should be made for each of the five defendants? Manifestly not! It appears to us, and we respectfully submit, that no person can carefully read and thoughtfully digest the affidavit now before the Court and not be thoroughly impressed with the conviction that the Affidavit is a fraud upon its face. That it carries upon its face the strongest proof that no diligence was used. That the search made was a perfunctory and a pretended search. That no *bona fide* effort was made to search for, or ascertain the residence of these defendants, and that the affidavit does not state one single jurisdictional fact. To hold such an affidavit good—because if good in this case it is good in every case—will be to open the doors of our courts to the rankest kind of fraud, and permit, as was done in this case, and has been done in over forty similar actions in the Courts of San Diego County, the title of land to be taken by judicial decree from its rightful owners, many of them residents of this state, and in some instances re-

siding upon the land, without giving them any notice whatsoever or permitting them to be heard in court in defense of their rights. It is no answer to say that where such a judgment is rendered the Defendant against whom it is rendered must look to a court of equity for relief. Where a court has been imposed upon and has inadvertently rendered such a judgment as the one under consideration, it seems to us that it is its bounden duty to expunge it from its record. If the Plaintiff suffers by such action, *it is because the Plaintiff himself has failed to comply with the law* and failed to do that which would vest the Court with jurisdiction.

The cases heretofore cited unqualifiedly hold that no Judgment shall be rendered against a man's property until he has first been given notice of the pendency of the action and a reasonable and an ample opportunity to appear and defend. When a man acquires property in the State of California, he acquires it under the Constitutional guaranty that no judgment shall be rendered against him or it without personal service of the process upon him, or until due diligence has been used to find him in this state. Does the mere fact, that the residents or citizens of one city do not know where he is, deprive him of this constitutional protection? Does the fact that inquiry has been made of fifteen people who know nothing about him deprive him of this constitutional provision? Is it necessary for a citizen of San Francisco or Los Angeles, who desires to acquire a piece of property in the City of Sacramento, to

thoroughly acquaint all the old residents of Sacramento and the officials of Sacramento County of his place of residence in order to prevent a judgment being rendered against him depriving him of his property upon substituted service? Manifestly not! The statute requires no such effort on his part. But the statute and the Constitution do protect him by providing that no judgment shall be rendered against him by any court of this state without personal service of summons upon him if he can be found within this state; and, if he cannot, after due diligence, be found within the state, *in the entire state*, not *in an infinitesimal fraction* thereof; then that substituted service may be had against him and a copy of the summons and complaint mailed to him if his residence can be found. To use the language of Mr. Judge Deady in *Neff* vs. *Pennoyer*, 17 Fed. Cases, 1279:

> "It was not intended that the law should be a means of spoiling non-residents, and therefore it provides that the defendant shall have personal notice of the proceedings, if possible, so that he may take proper measures to protect his rights. The provisions requiring a copy of the summons and complaint to be mailed to the address of the defendant is a wise and a just one, and well calculated to prevent its abuse. Little chance has a non-resident to be informed of the proceedings against him by the mere publication of the summons, often as in this case in a weekly newspaper of denominational circulation within the state and practically none without it."

From a review of the statement, principles and decisions above, certain conclusions inevitably follow, and they are:

1st. That to constitute due process of law there must be a reasonable notice give to the party against whom the proceeding is instituted, and a reasonable opportunity afforded him to appear and defend against such action or proceeding.

2nd. That the question whether such notice has been given to a defendant and he has been accorded a reasonable opportunity to defend is always a Federal Question, and is open to review where it is claimed that the proceeding does not constitute due process of law.

3rd. That the laws of the State of California provide that Defendants in civil actions in that state must in all cases have personal notice of the action by personal service of process upon them, except for one of five specific reasons.

4th. That such exception must be made to appear to the Court or a Judge thereof by an affidavit containing satisfactory evidence showing facts from which a just and reasonable influence must flow to an unprejudiced mind that such an exception exists, both in law and in fact, and that there is no other way of bringing the evidence of nonresidence, concealment or the exercise of due diligence to the legal mind of the Court, except by an Affidavit setting forth the facts. And that unless an Affidavit containing such facts as would legally justify the order for publication of summons, the Order of the Court made thereon is void, and no jurisdiction exists in the Court to render any

Judgment against a defendant against whom such pretended proceedings were taken.

5th. That a search for a defendant in one county of the state only, when there is no reason shown why the search is made in that county, or why a search is not made elsewhere throughout the state, is not due diligence to find a defendant in the state, as that term is used in the California Statute.

And in light of these Conclusions, we respectfully submit that a Writ of Error should issue to the Supreme Court of the State of California directing it to sustain the Order of the Superior Court of the County of San Diego, State of California, vacating and annulling the judgment herein referred to.

SAM FERRY SMITH,
*Attorney for Plaintiffs in Error.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

---

## No. 169.

---

THOS. E. JACOB AND FRANK HOBSON,
PLAINTIFFS IN ERROR,

*vs.*

S. L. ROBERTS, DEFENDANT IN ERROR.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

---

## SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

---

Upon the point "WHAT MUST BE SHOWN BY THE AFFIDAVIT BEFORE THE COURT ACQUIRES JURISDICTION TO MAKE AN ORDER FOR SUBSTITUTED SERVICE," made on page 34 of the original brief, we desire to cite the following additional authorities:

Proper affidavit placed of record in the suit is therefore a prerequisite to the issuance and publi-

cation of summons, is strictly jurisdictional in character.

Johnson *vs.* Hunter, 147 Fed., 133.
Howard *vs.* De Cordovia, 177 U. S., 609.

In Flint *vs.* Coffin, 176 Federal, 877, Judge Goff says:

> "Because due search was made unsuccessful in one county or because the defendants were non-residents, it does not necessarily follow that they might not have nevertheless been found and served in another county of the State."

In Wheeler *vs.* Cobb, 75 N. C., 22, Judge Bynum says:

> "This court has repeatedly held that the provisions of this statute must be strictly followed. *Everything* necessary to dispense with personal service of the summons must appear by affidavit. The mere issuing of a summons to the sheriff of the county of Pasquotank and his endorsement upon it the same day after it came to hand that 'the defendant is not found in my county,' is no compliance whatever with the law, for it might well be that the defendant was at that time in *another* county in the State and that the plaintiff knew it or by due diligence *could have* known it and made the defendant a personal service of summons. Every principle of law requires that this personal service should be made if compatible with reasonable diligence."

In Romig *vs.* Gillett, 187 U. S., 111-117, Mr. Justice Brewer says:

> "Nor is this inability shown by the mere fact that a summons issued to the sheriff of the county in which the land situated is returned not served."

In Stillman *vs.* Rosenberg, 78 N. W., 913, Judge Given says:

> "Under a statute that notice of publication be on an affidavit that service cannot be had on the defendant 'in the State' a published notice based on affidavit that service cannot be had on defendant 'in the county' is void."

In Grigsby *vs.* Wopschall, 127 N. W. (S. Dak.), 605, Judge McCoy says:

> "We are of the opinion (after stating the facts) that there was not a sufficient showing of diligence to give the court jurisdiction to order publication and render judgment against defendants. While in this class of cases it is not necessary that all possible or conceivable means should be used to ascertain the whereabouts of a defendant *still* it is necessary that the affidavit for publication should show that *all reasonable means* have been used to discover the whereabouts of defendant, to the end *that he may receive* actual notice of the pendency of the suit against him. *That is what is meant by the term 'due diligence.'*"

In Cochran *vs.* Markley, 87 N. W., 2, the court says:

> "Judgments which exclude persons from any interest or lien upon land should not be rendered without actual notice when by the exercise of reasonable diligence actual notice can be given. There should be either actual notice or an honest and reasonable effort to give it. The statute contemplates and the trial judges should invariably require that the party who institutes the suit shall in good faith make every reasonable effort to not only ascertain that the defendant cannot be served within the State but to ascertain his whereabouts in order that copies of the summons and complaint may reach him through the mail or otherwise."

In Grigsby *vs.* Wopschall, *supra,* Judge McCoy further says:

> "The affidavit for publication should show that all reasonable inquiry has been made of persons likely or presumed to know the whereabouts of the person sought to be notified by publication. Near neighbors who might know of near relatives of defendant who reside in some other locality who could furnish the desired information. It is the use of all such reasonable means of this character that constitutes 'due diligence.' Inquiry made of persons * * * who are not personally acquainted with and did not know defendant are wholly worthless and wholly immaterial to establish 'due diligence.'"

Respectfully submitted,

SAM FERRY SMITH,

***Attorney for Plaintiffs in Error.***

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 189

FILED
JAN 10 1972
CLERK, SUPREME COURT

THOS. E. LEWIS and FRANK HOUSER, *Petitioners-Appellants*,

*vs.*

S. D. ROGERS, *Defendant in Error*.

In Error to the Supreme Court of the State of California.

BRIEF OF DEFENDANT IN ERROR

WILLIAM J. MCCONNELL,
*Chief Deputy City Attorney*,
*San Diego, California*,
*Attorney for Defendant in Error*.

SAMUEL MEDNICK, Esq.,
*Of Counsel*.

# Supreme Court of the United States

OCTOBER TERM, 1911.

No. 169.

THOS. E. JACOB and FRANK HOBSON, *Plaintiffs in Error,*

*vs.*

S. L. ROBERTS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

## BRIEF OF DEFENDANT IN ERROR.

### STATEMENT OF FACTS.

The records of the County of San Diego, State of California, show that on March 11, 1873, about thirty-nine years ago, one D. Felsenheld, then a resident of the said city of San Diego, sold the west one-half of the southwest quarter of the southeast quarter of Pueblo lot E, of the Pueblo lands of the city of San Diego, County of San Diego, State of California, containing five acres, to "Thomas, Edward, Jacob and Frank Hobson of the State of Illinois, the parties of the second part." The above quotation is an exact copy of the record of the names of

the grantees. Said five-acre tract is the land in dispute in this action. Such grantees (plaintiffs in error here) never had said property assessed to them or either of them and never paid any taxes thereon, but completely and entirely abandoned the same and ignored it, and have during all the thirty-nine years since they purchased the same completely abandoned said property and refused to pay any taxes or assessments whatever thereon.

In 1873, at the time they purchased said five-acre tract, San Diego, California, was a small village and this five-acre tract was several miles from the settled portion of the village, was covered with sage brush, and was simply a "jack rabbit pasture," and for years was of but small value, which probably accounted for the lack of interest shown by plaintiffs in error therefor.

At the time that said D. Felsenheld sold said five-acre tract to said plaintiffs in error, he and one D. Choate were in partnership and carrying on a real estate business in said village of San Diego, and the records show that for two or three years subsequent to said sale said tract of land was assessed for taxes to said Choate, and he and said Felsenheld paid the taxes on said five-acre tract for these two or three years. The taxes levied and assessed on said five-acre tract for the year 1891, not having been paid, the said tract was sold for such taxes to one G. C. Arnold, who held the land for a year or two and then sold the same to one F. B. Walker. Thereafter and in June, 1896, said F. B. Walker and his wife sold said five-acre tract to said S. L. Roberts, defendant in error herein, who in said month of June erected and constructed a residence upon said premises, and in that month with his family moved into such residence and have since continuously occupied the same as their only residence and home and do now reside thereon.

Said Roberts, thinking that there might be some error in the assessment, or the sale, or the tax deed, of said premises to said Arnold, the purchaser at the tax sale, concluded to bring an action to quiet his title to said premises. Hence, this action was brought by him in March, 1897, and not being able to obtain personal service of the summons and complaint in the action upon the defendants therein, he applied to the trial court for an order authorizing him to serve the summons by publication.

The California statutes regulating the service of summons by publication are found in sections 412 and 413 of the Code of Civil Procedure of California, which sections read as follows:

> "Sec. 412. Where the person upon whom service is to be made resides out of the State, or has departed from the State, or cannot after due diligence be found within the State, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the State, and the fact appears by affidavit to the satisfaction of the court or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit or by the complaint on file herein, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant, or foreign corporation defendant, has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such court or judge may make an order that the service be made by publication of the summons."

> "Sec. 413. The order must direct the publication to be made in a newspaper to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months. In case of publication where the residence of a non-resident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and depositing it in the post-office; and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication."

The original summons was issued by the clerk of the trial court on the 25th day of March, 1897, and on that day it was delivered to the sheriff of San Diego County, California (Tr., page 16, Fol. 33), and on the following day the sheriff, after having satisfied himself that he could not find the defendants or any of them, made his return on said summons (Tr., bottom of page 16). The plaintiff in that action having observed what he thought was a mistake in the names of the defendants, thereafter and on April 3, 1897, filed an amended complaint (Tr., page 17), and also had another summons issued, dated April 3, 1897 (Tr., page 18), which summons was also delivered to the sheriff of San Diego County, on the 3d day of April, 1897 (Tr., page 18, Fol. 36). The sheriff again made a search for said defendants and two days later returned the summons with his endorsement thereon to the effect that he was unable to find the defendants or any of them in San Diego County (Tr., page 18, Fol. 37). Thereupon,

said Roberts made the affidavit set out on pages 19 and 20 of the Transcript and obtained the order for publication of the summons (Tr., page 20, Folios 40 and 41). Such summons was published as required by the laws of California (Tr., page 21, Fol. 41), for the period of two months—from the 5th day of April, 1897, to the 8th day of June, 1897, a period of sixty-three days, three days more than required by law or by the order of the court. It was published in a daily newspaper, except that such paper was not published on Sundays. Although a judgment by default might have been taken on the 6th day of July, 1897—that is, ninety days after the first publication of the summons—yet the judgment was not taken until July 15th thereafter (Tr., page 22, Fol. 43), so that the defendants in the action had one hundred and three days instead of ninety days in which to appear and defend if they desired so to do.

Plaintiffs in error come to this Honorable Court on two questions:

First. That the facts set out in the affidavit (Tr., pages 19 and 20) do not constitute due diligence as required by said section 412 of the California Code, and that if the facts set out in said affidavit are sufficient under said section 412, that, then,

Second. Said section is in violation of the provisions of section I, article 14, of the Constitution of the United States.

## NOW AS TO THE FIRST QUESTION.

We ask the Court to turn to the affidavit for publication of summons (Tr., page 19). It will there be seen that Roberts applied to John P. Burt, the County Assessor. The laws of California require a property owner to return a list of any property he claims to own to the County

Assessor. Therefore, it was the duty of plaintiffs in error to list their property in San Diego County with the County Assessor. This law they have for thirty-nine years violated, as it has never been by them returned to the County Assessor as required by law. Roberts then applied to W. J. Cornell, the County Tax Collector, to ascertain the residence or whereabouts of plaintiffs in error, thinking that if they had returned their property to the County Assessor as the law required them to do, that when the taxes became due and payable they would apply to the County Tax Collector to pay such taxes. The laws of California require the County Assessor on the first Monday in October in each year to turn over to the County Tax Collector the assessment rolls, and the County Tax Collector is the proper person to collect all State, County, and school district taxes. Now, even if these parties had not returned their property to the County Assessor for assessment, they still might have applied even by letter, if not personally, to the County Tax Collector to ascertain the amount of their taxes and pay the same, and in that case the County Tax Collector would surely know that the parties had called in person to pay the taxes, or if they had paid the taxes by letter he would undoubtedly have had the letter and could have given Roberts the post-office address of the defendants. So the County Tax Collector was also a very important person to apply to, and probably the person of all the residents of the State of California who would be most likely to know the defendants or their residence or whereabouts, because their property being located in his county, they, or some one on their behalf, would necessarily have to apply to him to pay the taxes if paid at all. When the taxes become delinquent and a sale of the property therefor is made by the County Tax Collector, he is required by the California laws to deliver the

assessment rolls to the County Auditor, to whom a person must apply to redeem his property from any sale for taxes. Therefore, Roberts applied to E. E. Shaffer, who was then County Auditor of San Diego County. Roberts then applied to the County Treasurer of San Diego County, because in redeeming property from a sale for taxes, one would go to the County Auditor and obtain a certificate or estimate of the amount necessary to redeem his property, which estimate is made out in triplicate originals. The property owner takes these three copies of the estimate to the County Treasurer and pays to the County Treasurer the amount required thereby, and the County Treasurer retains one of the three copies and the property owner retains one copy and returns the third copy to the County Auditor, so in case of a redemption the County Auditor would have a copy of this estimate with the name of the owner thereon, and the County Treasurer would also have a copy with the name of the owner thereon. Hence, these two county officers would be in a position to give information concerning any person who had redeemed his property from a sale for taxes. This also shows the reason why Roberts applied to J. W. Thompson, County Treasurer. Hence, there was not only a good reason, but a very extraordinary one why Roberts applied to these county officers. Roberts then applied to John F. Forward, County Recorder. Under the laws of California had this tract of land been offered for sale for taxes and no *individual* had purchased the same, the County Tax Collector would have bid it in for the State of California, and if the owner thereof had thereafter redeemed the property from such sale to the State, the State Comptroller's receipt or deed, which is issued by him, would be recorded in the County Recorder's office, so that the County Recorder would have a record of the deed from

the State of California to the redemptioner. The County Recorder is the official, who, by the laws of California, records all deeds, patents, mortgages, mechanic's liens, certificates of death of persons dying in the county, *lis pendens* or notices of actions pending in the courts affecting real property, and all transfers, agreements, and instruments of every kind and nature affecting real property, including copies of all orders confirming sales of real property in estates of decedents. Roberts then applied to Will H. Holcomb, County Clerk of San Diego County, for the reason that the County Clerk is *ex officio* clerk of the Superior Court of San Diego County, and is the legal custodian of all records, pleadings, papers and proceedings of such Court, and he is also the officer who issues all marriage licenses. He is the custodian of the records, pleadings and proceedings in estates of decedents. He also issues all naturalization papers. The laws of California also authorize him to administer oaths and take the affidavits without fee or charge, of all pensioners. Hence, his office is thronged every three months on what is known as "Pension Day," and this gives him an extensive acquaintance throughout his county, and especially with the people in and about the city of San Diego, the city in which this land is located. If any action had been brought in the Superior Court against one of the defendants, the records of the County Clerk's office would show the same. Again, if one of the defendants had died and his estate in San Diego County had ever been administered upon, the records of the County Clerk's office would show the same. Now, had the records of the County Clerk's office shown Roberts at the time he applied there for information concerning these parties that one of them was dead, then Roberts would have had to amend his complaint and make the administrator of the deceased a party

defendant. So that it is almost indispensable to have a search of the County Clerk's records made to ascertain whether or not any administration has ever been had upon the estate of a person, because if the records should show that the party was dead a judgment against him would be a nullity if his administrator had not been made a party to the action.

Roberts applied to Frank S. Jennings, Sheriff of San Diego County, for the reason that he is the officer who subpoenas all jurymen, including petit and grand jurymen, and who serves summons and subpoenas from all of the courts, and the nature of his duties take him to all parts of his county and give him an extensive acquaintance with the people of his county. Had any other action been brought against these defendants or any of them, during his term of office, he would have been called upon to serve them or make an endeavor to serve them. His other official duties often take him to different parts of the State and give him quite an acquaintance throughout the State outside of his county.

Roberts also inquired of George D. Goldman, City Clerk of the city of San Diego, who is also clerk of the City Council or Board of Trustees of such city. With the City Clerk are filed all matters which it is desired shall receive the attention of the City Council, and the main entrance to his office is considered one of the most public places in the County of San Diego, and is so recognized by using such place as the place of posting all notices required to be posted in more than one public place in the County of San Diego, for the reason that a great many people call at and have business connections with his office, and his acquaintance with the people throughout his city is therefore very extensive.

Roberts also applied to the City Attorney of the City

of San Diego, whose duty it is to attend meetings of the City Council, advise the City Council in all legal matters affecting the city, and to act as chief adviser of the city in legal matters, and to attend all cases brought in the city courts or police courts of said city, and who is also the legal adviser of all the city officers of said city of San Diego.

Roberts also applied to Nat. R. Titus, City Assessor and Auditor of said city of San Diego. All moneys used for municipal purposes by the city of San Diego are assessed and collected by the city officers, not by the county officers. They are due and payable at a different place and at a different time from the county taxes. It is the duty of the City Assessor and Auditor to annually assess all property within the city limits for municipal purposes, and it is also by law made the duty of all property owners to return to the City Assessor a list of all their property, and it was therefore the duty of Jacob and Hobson to return their property to said City Assessor for assessment. But during all the thirty-nine years since said five-acre tract was conveyed to them, they have never listed or returned it to the City Assessor or to the County Assessor for the purpose of assessment, and during all that time have never paid any city taxes or county taxes or city or county assessment of any kind whatever thereon, but wholly neglected and abandoned the same. Roberts applied to the City Assessor for the reason that if the defendants had made inquiries about the assessment of their property, such inquiry would undoubtedly have been made to the Assessor of the city in which their property was located.

Said Roberts also applied to T. J. Dowell, City Tax Collector and Treasurer of said city of San Diego, to ascertain if he knew the post-office address, residence or

whereabouts of the defendants. It is the duty of the City Tax Collector and Treasurer to receive and endeavor to collect all city taxes, and had the defendants desired to ascertain if any taxes had ever been levied or assessed upon their property, they would have had to apply to the City Tax Collector to ascertain the amount of such taxes, and whether or not the same had been paid, or whether the same were delinquent, and in such case said City Tax Collector would have had the post-office address or would have known the residence of such parties and could have given the same to said Roberts. It is also one of the duties of the City Tax Collector and Treasurer to sell property in his city for delinquent and unpaid taxes and to issue tax certificates and tax deeds therefor, or to issue redemption certificates in cases of redemption.

Said Roberts therefore in applying to said county officers and to said city officers, applied to the persons most likely in the whole State of California to know the residence or post-office address, or whereabouts of such defendants, for the reason that they, or some of them, were the people with whom said defendants would have had business dealings had they ever looked after their property or dealt therewith as required by the laws of the State of California. He applied to the persons who had the official and exclusive charge and custody of the records of transfers of real and personal property, of all actions and suits brought in the courts of that county, and of the officers having charge of the records of the settlement of estates of decedents, of the records of deaths and of marriages, and of the levy and assessment and collection of taxes, and of the sales of property for taxes, and of the records of redemptions from sales of property for taxes, and of the officer whose duty it is to subpœna the witnesses in the courts of the county and subpœna the petit jury-

men and grand jurymen for the county, and of the officer whose duty it is to serve process from the courts of said county, and of the officer who had charge of all of the municipal affairs of said city of San Diego and of the assessment, levy and collection of taxes for municipal purposes, and also of the sale of property for delinquent municipal taxes, and none of such persons could give said Roberts any information whatever concerning the residence or post-office address or whereabouts of the defendants or any of them. If said Roberts had not made such inquiries when he applied to the court for an order permitting him to publish the summons, the judge most likely would have asked him whether or not he had inquired of these several officers as to the residence or whereabouts of the defendants, for the reason that the court was well aware of the fact that any person owning property in said city, whether resident or non-resident of that county, was required by law to furnish to the County Assessor a list or statement of the property owned by him in such city or county, and a like list or statement to the City Assessor.

But said Roberts did not cease his inquiries with the city and county officers, but made many and other inquiries. He also inquired of R. V. Dodge, the postmaster of the city of San Diego, because it is a well-known fact that non-residents of small towns and villages often communicate with the postmaster of such town or village for any information desired about the residents of the town or village, or of the locality, and for the further reason that the official position of the postmaster brings him in personal contact with not only people of his city and county, but with many people outside of the city or his county, and with many people throughout his State. Had these defendants not entirely abandoned their property for over a third of a century, or had they desired to place

their property in the hands of some trustworthy and reliable agent in the city of San Diego, in order that it might be looked after for them, they most likely would have written the postmaster and asked him to recommend some trustworthy person in whose hands they might place their property interests.

To show that Mr. Roberts was most anxious to find the defendants in order that he might serve them with the summons in this action, and that he was acting in the utmost good faith, we call the Court's attention to the fact that he even went further and made inquiries of the old-time residents and the early settlers of San Diego; and, as set forth in his affidavit, he inquired of D. Choate and of George W. Hazzard, both of whom had at that time resided for more than a quarter of a century in the city of San Diego, and he also inquired of Ed. Dougherty, who was also an old-time resident of said city. The affidavit further states that Roberts "has made due and diligent inquiry of the old residents of the city of San Diego, the former neighbors of said defendants, and is informed by D. Choate" (Tr., page 19, Fol. 38), thus indicating that D. Choate was one of the former neighbors of the defendants. As before stated, at the time that the defendants purchased said five-acre tract of D. Felsenheld, said D. Choate and D. Felsenheld were in partnership together in the real estate business in said city of San Diego. Now, the defendants never returned their property to either the county or the City Assessor for assessment. The County Assessor and the City Assessor, if property is not returned by any one, will continue, year after year, to assess it in the name last upon the assessment roll, and the records of San Diego show that this five-acre tract for several years after it was sold by Felsenheld to plaintiffs in error was assessed in the name of

Felsenheld and Choate. Now the affidavit of Roberts (Tr., page 19, Fol. 38) says that Roberts "has made due and diligent inquiry of the old residents, the former neighbors of said defendants, and is informed by D. Choate," etc. This allegation of the affidavit would indicate that D. Choate was considered a former neighbor. The inference, of course, is slight, but we think that such an inference may be properly drawn from the affidavit. The Supreme Court of California in its decision in this case did draw such an inference (Tr., page 27, Fol. 52) and Roberts probably had in mind the fact that this property had formerly been assessed to Choate, and that Choate was connected with Felsenheld at the time Felsenheld sold the property to the defendants, and we think we may properly assume that that was one of the reasons why Roberts applied to D. Choate for information concerning the whereabouts of the defendants. But whether such statement will permit of such inference or not, it is a fact that Roberts inquired of D. Choate, and this goes to show that Roberts made inquiries of the persons most likely to have some knowledge of where the defendants could be found.

Plaintiffs in error on page 52 of their brief say: "It appears to us and we respectfully submit, that no person can carefully read and thoughtfully digest the affidavit now before the Court and not be thoroughly impressed that the affidavit is a fraud upon its face." Now we most respectfully ask what part of the affidavit is it that shows fraud upon its face? Even though it be, as plaintiffs in error say, "carefully read and thoughtfully digested." Roberts made inquiry of the business men of the city who had resided there for more than a quarter of a century—is that a "fraud upon its face"? Would plaintiffs in error wish him to have inquired of the arrivals of yesterday? Does it not show Roberts' good intentions and the utmost

good faith when he made inquiry of D. Choate, in whose name this property was assessed, for taxes during several years immediately after its sale to the defendants? This fact would lead one to suspect that Choate had been the agent of the defendants. Is this the part of the affidavit that shows "fraud upon its face"? If he had not done so it might have appeared that he was cupable. The affidavit shows that Roberts made inquiries of all the officers of both the county and city of San Diego, who by law were required to deal with this five-acre tract of land every year during the twenty-four years immediately preceding such inquiry—every year during those twenty-four years the County Assessor assessed this property and the City Assessor assessed this property. The County Tax Collector collected taxes on this property and the City Tax Collector collected taxes on it. Now, did Roberts commit a fraud when he inquired of all the county officers and all the city officers who in any way whatever would have to deal, who might be called upon to deal, and all of those who actually did deal, with this very piece of property? Did Roberts do wrong by inquiring of the County Assessor, who for the twenty-four years preceding such inquiry by Roberts had annually assessed such property? Did he commit a wrong when he inquired of the City Assessor, who for twenty-four years prior to Roberts' inquiry had annually assessed this property for city taxes and municipal purposes? Was it "a fraud upon its face" for Roberts to inquire of the ,County Clerk, who had the official custody of the records of the estates of decedents and which records might have shown that one or more of the defendants was dead, and who his heirs were, or who the administrator of his estate was? Was it a "fraud upon its face" for Roberts to inquire of the County Recorder, whose duty it would have

been to record the conveyance from the State of California to one of these defendants, had his property been sold to the State and he redeemed it? Was it a "fraud upon its face" for Roberts to make inquiry of the County Auditor and County Treasurer, to whom these parties would have paid their money had they redeemed their property or attempted to redeem their property from a sale of the same for taxes?

These parties complain that Roberts' affidavit did not state facts sufficient to warrant the court in granting an order to publish the summons, in this that it did not sufficiently show that the defendants (plaintiffs in error) were without the State of California. Now, the defendants (plaintiffs in error) have never contended and do not contend that they were within the State of California at that time, but admit they were residents of Ireland (see page 3 of brief of plaintiffs in error, about the middle of the page). Now, since they have admitted that they were non-residents of the State, then it follows that the only method by which the summons could be served upon them was by publication, and that the order of the court was therefore legal and valid and the service of the summons upon Jacob and Hobson by publication was legally made. Since the parties admit that they were without the State of California, they were in no way wronged or injured by the Court in granting the order upon the affidavit made by Roberts,—that is, they were wronged no more than they would have been had the affidavit been made in a manner unobjectionable to Jacob and Hobson.

Further, since they admit that they were non-residents, no showing of diligence was necessary, or is waived, for the Supreme Court of California, in *Anderson vs. Goff*, 72 Calif., 69, and *Ligare v. Cal. S. R. R. Co.*, 76 Calif., 610, held that where there is a non-resident no showing of diligence is necessary.

The Court's attention has already been called to Rue vs. Quinn, 137 Cal., 651. The affidavit for publication of the summons in that case did not set out nearly so many facts, did not show that inquiry had been made of so many officers or of other persons, and did not show due diligence near so strongly as does the affidavit of Roberts, and this fact was conceded by Judge Torrance, the trial judge, who set aside the judgment rendered in favor of Roberts and against the plaintiffs in error. And the Supreme Court of California in this case, in its decision on this point, said (See Tr., commencing at bottom of page 26):

> "The affidavit for publication of summons in this case contained all that was embraced in the affidavit considered by the Court in Rue vs. Quinn, 137 Cal., 651. Moreover, it contained additional facts not averred in the affidavit considered in that case. In Rue vs. Quinn the affiant declared that he had made inquiry 'of several prominent county officers' (giving the names of such officers), and further stated: 'I have also made inquiry of all other persons from whom I could expect to obtain information as to the residence or whereabouts of each of the said defendants, and, after such search and inquiry and due diligence the said defendants cannot be found within the State of California.' In the affidavit in the case at bar, the plaintiff names twelve county officers of the county of whom he made inquiry without avail as to the whereabouts and post-office address or residence of the defendants, or either of them. And, in addition he avers that he has made due and diligent inquiry of the old residents of the city of San Diego, the former neighbors of said defendants, and then proceeds to give their names, together with their statements of their inability to furnish any information. The affidavit here presented is thus more complete and persuasive in its statement of facts than that reviewed by this Court in Rue vs. Quinn."

Judge Torrance, the Judge of the trial court who set aside the judgment that Roberts obtained against plaintiffs in error, conceded at the time that he set aside the judgment that the affidavit in this case was more copious and complete and had a fuller statement of facts than were contained in the affidavit passed upon by the Supreme Court of California in *Rue vs. Quinn.*

Evidently the five justices of the Supreme Court of California, who rendered that decision, did not think that Roberts' affidavit was a "fraud upon its face," and that decision was by the Court in bank. Plaintiffs in error applied for a rehearing, which was denied by the Court in bank.

Section 473 of the Code of Civil Procedure of the State of California permits any one to come in within one year after a judgment has been rendered against him on service by publication and have the judgment opened up. That section, however, further provides that one can have the judgment opened up only on condition that he shows by *affidavit* some good reason why he did not appear in the action within the time required by law, that he had no notice of the same, and he must further show by such affidavit that he has a good defense to the action on its merits. Now, in this case, the defendants (plaintiffs in error) did not come in within one year, but waited for about eight years after the judgment was rendered before they appeared. They did not make an affidavit of merits and did not make any affidavit at all. In fact there is not a single paper, pleading or proceeding of any kind whatever connected with this action in *any* of the courts signed by the plaintiffs in error or by either of them. When our statute requires an affidavit of merits to be presented before the Court will even hear an applicant to have a judgment set aside which was rendered against him on publication of the summons within one year of such appli-

cation, it is apparent upon its face that some extraordinary motive induced Judge Torrance of the trial court in this action to open up the judgment after the lapse of about eight years without an affidavit of merits and without any showing whatever on the part of the defendants (plaintiffs in error), that they had a meritorious defense to the action, or without any paper or pleading of any kind whatever being signed by them or either of them. We believe that the motive that induced Judge Torrance to commit such an extraordinary judicial act was his resentment toward the Supreme Court of California, engendered by that Court's decision reversing him in the case of *Rue vs. Quinn*, and the many other cases affirming *Rue vs. Quinn*, decided by that court, for the reason that Judge Torrance prepared and had presented to the Supreme Court in Rue vs. Quinn an elaborate argument and brief in support of his order, opening up the judgment in that case, instead of appearing an *amicus curiae* he desired to become its instructor.

On page 52 of his brief counsel for plaintiffs in error says "To hold such an affidavit good—because if good in this case it is good in every case—will be to open the doors of our courts to the rankest kind of fraud and permit, as was done in this case, and has been done in over forty similar actions in the courts of San Diego County, the title of land to be taken by judicial decree from its rightful owners, many of them residents of this State," etc. Now what has counsel gone outside of the record to make such a statement for, unless it be to imbue this honorable court with the idea that this defendant in error is one of a number of persons engaged in bringing actions to quiet title and obtaining service by publication of the summons. This matter being entirely outside of the record and we having had no notice that counsel would make

any such an unwarranted statement, we have no means of knowing whether or not the statement is true or false. If the bench of counsel's home is in such a condition as his statement in his brief would lead one to presume,, it would appear to indicate that his influence with such bench has not been very beneficial and less influential. We cannot divine the object that counsel had in mind in presenting a statement to the court so unwarranted by the facts of this case, unless it were to enlist the sympathy of the court in behalf of plaintiffs in error and in behalf of all persons who fail, neglect and refuse to pay the taxes lawfully levied and assessed upon their property, and if this be not the object then why was such statement made? We do not feel that such matters require much of our attention, but we object to any improper or fraudulent action being imputed to Roberts for the reason that he was not the party who purchased this property at the tax sale. The ownership of the property had passed through two persons, G. C. Arnold and F. B. Walker and wife, before it reached Roberts, hence we do not see that there was any occasion for any such statement.

By the Constitution of California, adopted in 1879, our present Superior Court, which is a court of record, and a court of general jurisdiction, superceded the former County Courts and the District Courts. Since 1880 the number of civil suits filed therein now exceed 18,000, and the number of probate 4,000, if there have been, as counsel states, only about 40 suits to quiet title, is it not a record to be proud of, rather than to speak in disparagement of? Is not the number exeremely small, compared with the whole number of actions brought in that court?

We again call attention to the statement of counsel made on page 52 of his brief where he says, "To hold such an affidavit good will be to open the doors of our

courts to the rankest kind of fraud." Evidently, the Supreme Court of California did not believe this statement, else it would not have held good the affidavit in *Rue vs. Quinn* and also the affidavits in the many later cases wherein *Rue vs. Quinn* has been affirmed.

The statement just quoted from page 52 of the brief of plaintiffs in error, to the effect that the affidavit of Roberts is a "fraud upon its face" is about as silly and as unwarranted as anything possibly can be. For there is not a word in the affidavit, and there is not a word or act of any kind whatever in connection with the suit, that indicates any fraud, or any wrong intention whatever upon the part of Roberts. If Roberts had evaded all of the county officers and all of the city officers, and had made inquiries of a number of persons who had located in the city of San Diego but a few days previous to such inquiry and had avoided making inquiry of the long-time residents of that city, then there might have been ground for such an assertion.

In the same paragraph counsel further says "and to permit the title of land to be taken by judicial decree from its rightful owners." This is begging the question by assuming that these parties (plaintiffs in error) were the *rightful* owners of this five-acre tract at the time Roberts instituted this action. Plaintiffs in error had repudiated and abandoned their title to said five-acre tract for more than thirty years, and had permitted the property to be sold for taxes lawfully levied and assessed thereon, and this property had been sold for taxes fourteen years before they appeared herein.

Counsel for plaintiffs in error complain because Roberts made his search in San Diego County and ask why. We answer because a search made anywhere else in any other county of the State would have been a nullity and

void, unless search should also have been made in San Diego County, because

*First.* That is the county where the property is located; and

*Second.* The laws of California require such an action to be brought in the county where the property is located; and

*Third.* The laws of California also require that publication of the summons shall be had in the county where the property is located, for the reason, we presume, that a non-resident is more likely to take a newspaper published at the place where his property is located than elsewhere, since he might thereby see any notice published of a suit against himself or against his property.

By this statement counsel accuses the Supreme Court of California of the "rankest kind of fraud" because that court has approved affidavits far less complete, far less full in their statements of facts, affidavits that show that far less inquiry was made than Roberts made in this case. In the following decisions none of the affidavits shows as bona fide an effort, none shows as many facts, as many inquiries of as many persons, or of as many officials as Roberts' affidavit:

Rue vs. Quinn, 137 Cal., 651;
Weiss vs. Cain, 73 Pac., 980;
People vs. Wrimm, 143 Cal., 11;
People vs. Norris, 144 Cal., 422;
People vs. Mason, 144 Cal., 770;
Sharp vs. Salisbury, 144 Cal., 721;
Shepard vs. Mace, 148 Cal., 272;
Cargile vs. Silsbee, 148 Cal., 260;
Emery vs. Kipp. 153 " 83

The record in this case (Tr. page 16, Fol. 33, and page 18, Folios 36 and 37), shows that the Sheriff of San

Diego upon two separate occasions made efforts to find the defendants—first on March 25th and 26th, 1897, and again on April 3rd to 5th, 1897. Thus a greater effort was made in this case by the sheriff to find the defendants than was made by such officer in any of the California cases cited. Now, did Roberts commit a *fraud* because he had the sheriff make an effort upon two occasions instead of one to find the defendants?

Counsel for plaintiffs in error appears to be endeavoring to call forth the sympathy of this honorable court in favor of Jacob and Hobson. What did these men do to entitle them to the sympathy of this court, or even to permit them to approach the equity side of this court? For to entitle them to equity they must do equity. The deed to these people describes them as of "the State of Illinois, the parties of the second part." Their counsel on page 3 of his brief states they "were residents of Ireland." In either case they were non-residents of California. Now when they went to the State of California and purchased property there they expected that State to protect that property. They therefore took upon themselves the corresponding duty of supporting the government that was to protect their property by paying such taxes and assessments as might be lawfully levied or assessed upon the property. Did they do this? No. They have never paid one cent of taxes on this property, have never paid any taxes or any assessments, have never paid any attention to the property, but absolutely abandoned it for thirty-four years prior to the time that Roberts commenced his suit to quiet title. When they purchased it and for years thereafter the property was on the outskirts of the village and of scarcely any value. That, however, was no excuse for not paying the taxes lawfully assessed thereon and thereby contributing to the support

of the very government that they are now, through this honorable court, begging protection from. They contributed nothing whatever to make the property valuable. About thirty-five years later, by and through efforts and investments of others, this five-acre tract became of some value. Eight years after Roberts had obtained judgment quieting his title to this property, these parties appear and ask that the judgment be set aside and held for naught, on the ground that it would be unjust and inequitable to them to let it stand. But under what rule of justice or equity they are entitled to such a favor we are unable to discover, and none has been pointed out by their counsel. The State must have the power to collect its taxes, else it could not exist, and it is the duty of every property holder to pay the lawful taxes upon his property. When a person buys property in one of the States he thereby submits the money he invests in such property to the laws of that State and says in effect to that State that he accepts this property subject to the right of the State to lawfully assess the same; that the State may sell such property in order to collect the taxes so lawfully assessed thereon, if he shall not pay the same. These parties are not willing to do that. They have refused for thirty-nine years to pay any taxes whatever, or bear any portion of the burden or expenses necessary to the maintenance of the government that they now appeal to to restore them their property. They ask in effect that an exception to this rule be made in their favor, and that, although other people's property has been sold to pay the expenses of operating the government, theirs be not so assessed and be not sold, but that it be restored to them.

In Murray vs. Murray (115 Cal., 276), that Supreme Court said:

"That according to the common experience of mankind, the owner of property keeps some oversight of it wherever situated."

These parties for over the third of a century neglected to make any claim whatever to this property or keep any oversight whatever thereof, or to make any inquiries concerning it, showing the most complete abandonment of the same, and no doubt years ago believed that the same had been sold for taxes because all civilized countries levy taxes upon property and in case of non-payment sell the same. These parties are presumed to have once resided in the State of Illinois, and in that State as in all of the States of the Union taxes are required to be paid annually, although some of the States permit a portion of the taxes to be paid within two years, and these parties must have years ago been satisfied that the title of their property had passed from them through a sale thereof for taxes, or they would have made some inquiry concerning the same.

## SECOND.

NOW AS TO THE CONTENTS OF THE AFFIDAVIT BEING A SUFFICIENT BASIS FOR THE COURT'S ORDER TO PUBLISH THE SUMMONS:

In Ligare vs. Cal. S. R. R. Co., 76 Cal., 613, the Supreme Court held that if the affidavit presented *some* legal evidence of due diligence, the judge was authorized to weight such evidence and if satisfied that the evidence of diligence was sufficient he was vested with authority to make the order, and there quoted with approval the following extract from the opinion in Forbes vs. Hyde, 31 Cal., 342, viz.:—

"But there being some appreciable evidence of a legal character which calls into action the judgment

of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it and his action is simply erroneous. But, as there was jurisdiction to act, until reversed or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid."

"When the proof has a legal tendency to make out a case in all its parts for issuing process, then, although the proof may be slight and inconclusive, the process will be held valid until set aside by a direct proceeding for that purpose." (Miller vs. Brinkerhoff, 4 Denio, 118.)

"If there is a total want of evidence upon a vital point in the affidavit the court acquires no jurisdiction by publication of the summons, but when there is not an entire omission to state some material fact, but it is inferentially or insufficiently set forth, the proceedings are merely voidable." (Atkins vs. Atkins, 9 Nebr., 200; affirmed in Britton vs. Larson, 23 Nebr., 806; Slocum vs. Slocum, 17 Wis., 150; Forbes vs. Hyde, 31 Cal., 342; Harris vs. Claflin, 13 Pac. Rep., 830.)

"Inasmuch as the statute requires for an order of publication that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of by appeal or some direct proceeding." (Pennoyer vs. Neff, 95 U. S., 714.)

In this case the court opened up the judgment after the expiration of about eight years. Section 426 of the Code of Civil Procedure of California limits the time to *one* year.

In People vs. Dodge, 104 Cal., 487, the Court holds:

> "In all cases where a judgment is *voidable* and not *void* on its face, the error can only be corrected by an appeal, or by motion to set the same aside in the court where rendered, which motion must be made within six months after the rendition thereof, and, if denied, by an appeal from the order of denial. After the expiration of six months from its rendition a judgment can only be set aside upon motion in cases where it is upon its face absolutely void for want of jurisdiction of the subject matter or of the person of the defendant."

Since this decision in People vs. Dodge was rendered the time in California has been extended from six months to one year.

> "A failure to state in the affidavit for publication of the summons the facts showing diligence in endeavoring to ascertain the name and residence of the owner of the land sold for taxes, would be good cause for the reversal of the judgment on appeal, yet such failure will not render the decree void on its face." (Little vs. Chambers, 27 Ia., 522.)

This honorable Court in Marx vs. Ebner, 180 U. S., 314, affirmed the case of Kennedy vs. N. Y. Life Ins. & T. Co., 101 N. Y., 487, and also the case of McDonald vs. Cooper, 32 Fed. Rep., 745, both of which cases cite all the leading authorities up to the date of the rendition of the respective opinions, and all the authorities cited were cases where affidavits for the publication of summons were attacked for insufficiency. In none of the cases cited by this honorable court, or by the Federal court in McDonald vs. Cooper, or by the Supreme Court of New York in Kennedy vs. N. Y. Life Ins. & T. Co., was there

in the affidavit anything like so strong or full a presentation of facts or as exhaustive a search made, or as many officials interviewed, or as many private persons interviewed, or as great an effort made as was made by Roberts in the case at bar, so that either the affidavit in this case must be held sufficient or else the cases cited should be reversed. It does appear to us that there is any other course to be pursued. If this honorable court was correct in holding the affidavits sufficient in the cases of

Pennoyer vs. Neff, 95 U. S., 714;
Marx vs. Ebner, 180 U. S., 314,

and the Federal court was correct in McDonald vs. Cooper, 32 Fed. Rep., 745, and the New York Court of Appeals in Kennedy vs. New York Life Ins. & T. Co., 101 N. Y., 487, then the affidavit in this case must be held to be sufficient and the judgment of the Supreme Court of California be affirmed, or else the cases just mentioned should be reversed.

One of the latest cases reviewing the authorities is Marx vs. Ebner, brought in the United States District Court for the District of Alaska. The defendants were served by publication and judgment rendered, and the defendants applied to have the judgment set aside, on the ground that the court did not acquire jurisdiction of the defendants for the reason that the affidavit presented to the court for the order to publish the summons was insufficient to give the court authority to make the order. The United States District Court held the affidavit sufficient, and on appeal to the United States Supreme Court (Marx vs. Ebner, 180 U. S. Supreme Court, 314), the judgment was affirmed. The facts set out in that affidavit were nothing like as strong or full or comprehensive and did not contain near as many facts showing diligence as

are set out in the affidavit of appellant Roberts herein. The Supreme Court, however, in that case held the facts "Sufficient proof to give the judge jurisdiction to determine the question before him, and consequently his order for publication was valid. The order was not alone based on the statement that the defendants could not, after due and diligent search, be found, but there were other facts showing the non-residence of the parties. * * * We think where the affidavit shows that the defendant is a non-resident of the district, and that personal service cannot be made upon him, and the officer to whom the summons was delivered returns it with his endorsement that after due and diligent search he cannot find the defendant; that the affidavit of the attorney for plaintiff stating that the defendant was not a resident of Alaska; that personal service of the summons could not be made on the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question. * * * It is not to be expected that positive proof that the defendant cannot be found within the State or district will always be attainable. * * * Facts must appear from which it will be a just and reasonable inference that the defendant could not, after due diligence, be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a non-resident of the State, and there is an affidavit that personal service cannot be made upon him within its borders. * * * There is, too, some presumption that the public officer who has received the process for service has done his duty and has made the reasonable and diligent search for the defendant that is required. Such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a

presumption in favor of the performance of official duty. Within this rule the proof in this case was enough to give jurisdiction to the judge who granted the order to decide the question."

The Supreme Court there reviews quite fully the authorities on the question of what facts show "due diligence," as that term is used in statutes of the different States. It there approves of the case of Kennedy vs. N. Y. Life Ins. & T. Co., 101 N. Y., 487, and also the case of McDonald vs. Cooper, 32 Fed. Rep., 745, which last mentioned case cites numerous authorities where the affidavits have been held sufficient, none of which affidavits are nearly so strong as that of appellant Roberts, in this action.

In Storm vs. Adams, 56 Wis., 137, that court held an affidavit sufficient where the facts set out were very slight compared with the extensive search and inquiry made by Plaintiff Roberts herein.

In Pike vs. Kennedy, 15 Oregon, 420 (15 Pac. Rep., 637), it was held:

> "Before an order for publication of summons will be made, an affidavit must be filed, showing that defendant cannot, after due diligence, be found in the State, or it must appear that such facts exist as show that diligence would be of no avail; and an affidavit which states that defendants reside at Walla Walla, in the Territory of Washington, which is their post-office address, that personal service cannot be made upon said defendants, or either of them, for the reason that defendants have departed from this State and remained absent therefrom for more than six consecutive weeks, and now reside at Walla Walla, is sufficient."

In Martin vs. Pond (30 Fed. Rep., commencing at bottom of page 18), the court said: "With regard to the

next objection, it may be conceded that notice to the defendant is essential to divest him of his rights and interests. But the publication is the notice,—it is the equivalent to the personal service of a summons; and it is not pretended that there was any defect in the publication in the case at bar. The defect alleged is in the affidavit for publication. * * *" The affidavit filed is as follows: "'L. M. Stewart, being first duly sworn, says that he is attorney for the plaintiff in the above entitled action; that he believes that the defendants are not residents of the State of Minnesota, and cannot be found therein; that he has deposited copy of the summons in said action in the postoffice at Minneapolis, Minnesota, directed to each of said defendants, at Osage Agency, Kansas, their place of residence, and had prepaid the legal postage thereon; that the subject of this action is real property in the State of Minnesota, to wit, for the foreclosure of a mortgage on real estate situated in the county of Hennepin aforesaid; and that the said defendants have, or claim to have, a lien upon or interest in said real estate, and the relief demanded in said action consists in excluding the said defendants from any interest or lien therein.' Now, this is, in form, all that the statute requires. But it is shown by the testimony that Osage Agency, Kansas, was not the place of residence of defendants; that they resided at Oskaloosa, Iowa; and this mistake, it is claimed, invalidated the affidavit, and rendered the publication void; and that the defendants were never brought into court, are not bound by this decree, and still retain the right to redeem. Mr. Stewart, in stating the place of residence of defendants, and in mailing to them copies of the summons, acted upon the only information he could obtain, and that information was such as to justify the action of any reasonable and prudent man. So the question is nar-

rowed to this: Will such a misstatement, though believed to be true, and founded upon reasonable information, avoid the entire proceedings? Was it jurisdictional? Under the decision of the supreme court in a somewhat similar case (Cooper vs. Reynolds, 10 Wall, 308), I must answer the question in the negative. That was an attachment case. The affidavit therefor was defective. But notwithstanding, the Supreme Court sustained the judgment. Justice Miller, speaking for the court, says, on page 319: 'The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or, possibly, the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property.' * * * All was done in good faith, with no circumstances of fraud, concealment, or oppression. The proceedings were apparently regular. A judicial sale was made and confirmed. Years after, when values have changed, a speculator comes prying into the records to see if some technical defect cannot be found in the judicial proceedings, and a title, obtained in good faith, and in reliance upon those proceedings, be destroyed. * * * Public policy requires that judicial proceedings be upheld, and that titles obtained in those proceedings be safe from the ruthless hand of collateral attack. If technical defects are adjudged potent to destroy such titles, a judicial sale will never realize the value of the property, for no prudent man will risk his money in bidding for and buying that title which he has reason to fear may years

thereafter be swept away through some occult and not readily discoverable defect."

In the case of Cohen vs. Portland Lodge (144 Fed. Rep., 266), the court was required to pass upon the sufficiency of an affidavit and held such affidavit sufficient although it was not nearly so complete in its statement of facts, and did not show any diligence whatever except that the affiant had inquired of one person to ascertain the residence of the defendants, and in that case the court said: The affidavit upon which the order for publication is based was made by one of the attorneys for plaintiff in the foreclosure suit, and sets out: "That the amended complaint in said suit was filed with the clerk of said court on the 19th day of November, 1897, and summons thereupon issued. * * * That said summons issued as aforesaid was delivered to the sheriff of Multnomah County, State of Oregon, with directions to said sheriff to serve the same upon the defendants and each of them, and said sheriff has returned said summons to the clerk of this court with his return endorsed thereon to the effect that said defendants, Aaron M. Cohen, Moses M. Cohen, and Emanuel Meyer, cannot, after due diligence, be found within this State, although diligent search and inquiry for the purpose of finding them have been made. That this affiant has made diligent search and inquiry for the purpose of finding the last-named defendants and each of them as follows: I have inquired of the defendant M. C. Lyon, who is one of the executors of the last will and testament of Nathan Cohen, deceased, the father of said defendants, Aaron M. Cohen and Moses M. Cohen, and he informs me that neither of said minors is at this time within the State of Oregon, and that both of them are at the present time residents of and now are at the Pacific Hebrew Orphan Asylum & Home Society, at

No. 600 Devisadero, corner Hayes Street, in the city of San Francisco, State of California, and that that is their present postoffice address. That the said M. C. Lyon informs me that he knows personally that said minors are at said place, as he placed them at said institution, which said institution is a school, and that he is in constant communication with the authorities there, and that he has charge of their schooling and education. * * * That this affiant, therefore, says that personal service of said summons cannot be made on said defendants, and prays for an order that service of the same may be made by publication thereof as is by law provided." It may be further premised, in a general way, that the judgment or decree of a superior court intrusted with general jurisdiction, acting within the scope of its ordinary powers and in pursuance of the course of the common law, is aided by an attendant presumption that jurisdiction was regularly acquired, as to both the subject-matter and the person, until the contrary appears. * * * This brings me to a consideration of the sufficiency of the affidavit to support the order made and entered requiring service of summons by publication. Section 56 of the statute of the State of Oregon (B. & C. Comp.) provides that when service of summons cannot be made as prescribed by section 55—that is, upon the person or constructively so, as at his dwelling house or usual place of abode—and the defendant, after due diligence, cannot be found within the State, and that fact is made to appear by affidavit to the satisfaction of the court or judge thereof, it or he may grant an order that service be made by publication thereof. * * * From this reading it is manifest that the statute has made it a judicial function of the court or judge to determine from the affidavit whether the plaintiff has been unable, after the exercise of due diligence, to ob-

tain personal service of summons upon the defendant, within the territorial jurisdiction of the court; and this includes the determination, as well, as to whether due diligence has been observed. The sufficiency of the affidavit may be brought to a test upon appeal, or it may be upon a collateral issue such as this; but the basis of inquiry is *vitally* and *radically different* in the one case from that of the other. On appeal the question is whether the court or judge has erred in granting the order. What the trial court may have deemed legally sufficient may not be so in the opinion of the appellate tribunal. At the worst, the consequence might be a reversal, and the cause sent back for further proceeding. The party is not sent out of court finally. But, when considered collaterally, the question is whether the affidavit contains matter which, in contemplation of the statute, is sufficient, upon which the court or judge was warranted in passing the order. The question becomes one, not of error, but whether there is *any* evidence legally sufficient upon which the judicial mind may be satisfied. * * * The principle is well defined, and has the sanction of adjudicated cases. In Forbes vs. Hyde, 31 Cal., 342, 349, Mr. Justice Sawyer says:

> "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony; but, there being some appreciable evidence of a legal character which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon

the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. His order would, in such case, be reversed on appeal. But, as there was jurisdiction to act, until reversed, or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid. Such a judgment could not be collaterally attacked. See also Staples vs. Fairchild, 3 N. Y., 41; Matter of Faulkner, 4 Hill (N. Y.), 601. And so has Mr. Justice Deady spoken in this court. In McDonald vs. Cooper, 32 Fed., 745, he says: 'The affidavit must contain some evidence of the ultimate fact, besides the assertion of the affiant, on which the judicial mind may act in granting the order. And, however slight and inconclusive this evidence may be, if it has a legal tendency to prove the diligence, and that the defendant could not be found in the State, it is sufficient to give the court jurisdiction, and sustain the order against a collateral attack.' But it is unnecessary to cite or look for authorities elsewhere. The Supreme Court of the State of Oregon has enunciated the principle of its construction of the statute. Speaking through Mr. Justice Bean, in George vs. Nowlan, 38 Ore., 537, 64 Pac., 1, it says:

'The statute requires that certain facts shall be made to appear by affidavit to the satisfaction of the court or judge thereof (Hill's Ann. Laws Or., Sec. 56) before an order of publication is made; and where the affidavit tends to prove such facts, and the court or judge adjudges it sufficient, such adjudication is conclusive in a collateral proceeding.' "

The principle has the sanction, also, of the United States Supreme Court. Pennoyer vs. Neff, 95 U. S., 714. The question is, therefore, whether there is any evidence stated in the affidavit legally competent upon which to support the court's order for service of summons by publication thereof. * * * Tested in view of a collateral attack, and not upon an appeal or error, the affidavit is

sufficient when the proofs exhibited thereby have "A legal tendency to make out a proper case in all its parts for issuing the process." Pike vs. Kennedy, 15 Or., 420, 15 Pac., 637. "The rule may be stated thus," says the Supreme Court of Nebraska, in Atkins vs. Atkins, 9 Neb., 191, 2 N. W., 466, which case was affirmed in Britton vs. Larson, 23 Nebr., 806: "If there is a total want of evidence upon a vital point in the affidavit, the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable." To the same effect is the language of the court in Harris vs. Claflin, 36 Kan., 543, 13 Pac., 830. * * * As to the further diligence exerted, the affiant states what he did and what he ascertained; and if, based upon the information thus obtained, he had made the further averment, either flatly or upon information and belief, that defendant was a non-resident and at the time without the State, and that personal service could not be made upon him within the State, in all probability there would have been no question raised as to the sufficiency of the affidavit, and yet these would have been the statement of conclusions that the court or judge must deduce from the facts shown, say the authorities. The affiant was not required to support his affidavit by supplementary affidavits of the person or persons inquired of, nor to produce them as witnesses for the court's examination, and there is no way of getting the facts as to the affiant's diligence and the result of his inquiries to the court or judge except his statements in his affidavit as to what he had done and ascertained, and unless he has, or has acquired, personal knowledge, he must of necessity state what he has ascertained or heard from others, which, in its ordinary acceptation, is hearsay. Yet it is the only way that the

court may be apprised of the diligence put forth, and of what has been ascertained through inquiries which the party is bound to prosecute so as to determine as to the residence of the defendant, and whether service can be personally had. I am of the opinion that, although hearsay in a general sense, it is just such evidence or statement of facts as is within the contemplation of the statute. It shows diligence in respect of the endeavor to make personal service of the summons. * * * See, also, McDonald vs. Cooper and Atkins vs. Atkins, *supra*. These authorities, together with the authority of Pennoyer vs. Neff, 95 U. S., 714; Marx vs. Ebner, 180 U. S., 314; George vs. Nowlan, 38 Or., 537, fully sustain the view that the affidavit is quite sufficient, when tested by the collateral attack upon the decree of the court."

This case was appealed from the District to the Circuit Court and was heard by Circuit Judge Ross and District Judges DeHaven and Hunt. The Circuit Court affirmed the opinion of the District Court, and in doing so said (152 Fed. Rep., 357):

> "It is perfectly clear to us that the appellant cannot rely upon mere imperfection of statements, or even uncertainty of statement of jurisdictional facts in the affidavit for the order for the publication of summons obtained in the foreclosure suit. Nor can he admit that there was some evidence of the essential facts contained in the affidavit, and contend that such evidence was not sufficient for the Court to have acted upon. He must stand or fall upon the ground, not of irregularity or error, but that there was *no* evidence in the affidavit for an order of publication filed in the *State Court* upon the points of residence and absence from the State of Oregon. * * * Inquiry of one of the executors of the will of the deceased Cohen, as to the whereabouts of the minor

child, and having been told by such person that he was then residing at a particular orphan asylum in San Francisco and that his schooling was under the charge of the executor giving such information, certainly constituted an ample showing of diligence to ascertain the whereabouts of the minor. * * * The affiant declares that a summons had been delivered to the sheriff to serve the same upon the defendant named therein, and that it had been returned endorsed, in effect, 'not found.'" * *

"Appellant urges, however, that the averments of absence by affiant are mere opinions and hearsay. * * But suppose a person cannot be found within a State after the exercise of ordinary and honest diligence to learn of his whereabouts. And if one makes such diligent search to find, and swears positively to its having been made, is he not in a position to accept and rely upon the information he has obtained by adopting a conclusion, necessarily a belief, that the person looked for is in fact absent from the State? We think he is, and that when he gives the source of his information, and then declares that because of the information a summons, or paper cannot be handed to the person sought within the State, he adopts the information, and, by adopting it, makes an averment of his own that the person is absent from the State. Or it may be put in another way: When the allegation of the affidavit positively shows due diligence to find, and states specific information given as to the absence of the person sought, then the affiant who states the information and follows the statement of it by the declaration that 'therefore, personal service cannot be made,' makes his conclusion his own belief, properly resting it upon circumstances which he may reasonably use in support of the deduction positively made, which deduction is in effect nothing more nor less than that the defendant is absent from the State. It is true that the statement that 'therefore * * personal service * * cannot be made,' is a con-

clusion, and that an affidavit couched only in the words of the statute is not sufficient; but if there is a showing of facts constituting due diligence, positively made, as in this case, and if there is a positive statement of information received from others in a position to know of the presence or absence of the defendant, as there is here, the information received from such others is competent to show absence, and if adopted by the affiant, as it is here, by using the words 'therefore,' etc., it is an oath as to the facts stated, and it goes to prove absence in a legal way; and, therefore, as a part of the affidavit, is to be weighed by the court in passing upon an application for an order of publication. * * We know that in the daily practice of courts, witnesses swear positively to the non-residence of people, and that their statements so made rest upon information and belief, yet such testimony is, of practical necessity, received as fit and sufficient proof. * * In the affidavit under consideration there is the information of the non-residence of the appellant, given to affiant by the executor. Affiant swore positively that because of this information personal service could not be made and asked for service by publication. His conclusion, when expressly based upon facts or information just theretofore stated, must be considered with such information, and, as the conclusion or ultimate fact was legally inferable, we find that both probative facts and legitimate inferences of non-residence appeared in the affidavit submitted to the Court. * * *Absolute deficiency* must exist, however, in the affidavit examined here to warrant the Court in ruling that the judgment of the State Court was a nullity. And we do not find an absolute deficiency. The affidavit is far more complete than that made by the affiant in the case of Pennoyer vs. Neff, 95 U. S., 721. Discussing the statute under which the Court made its order, it was there said: 'There is some difference of opinion among the members of this Court as to the rulings upon these alleged defects. The majority are of opinion that, inasmuch as the statute requires, for an order

of publication, that certain facts shall appear by affidavit to the satisfaction of the Court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally.' And, again, in Marx vs. Ebner, 180 U. S., 314, the Supreme Court, in considering an affidavit for an order of publication, held that it was proper to consider the return of the officer who was directed to serve the summons together with the other facts proved in the affidavit. The Court also there held that there was some presumption that the public officer who received the process did his duty, and made diligent search for the defendant, and that it was not to be expected that positive proof that the defendant could not be found within the State or district would always be attainable. 'Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a non-resident of the State, and there is an affidavit that personal service cannot be made upon him within its borders, and there is a certificate of the marshal such as appears in this case.' * * Our opinion is that as a whole it (the affidavit) contained a sufficient showing for the Court to have acted upon."

The provisions of Sec. 412 of the Code of Civil Procedure of the State of California, so far as they are applicable to this case, were adopted by the Legislature of that State in the year 1872, and have therefore been in force in that State for forty years. It has now been about ten years since the Supreme Court of California decided the case of *Rue vs. Quinn*, 137 Cal., 651, and there decided what facts, what search, what inquiries, constituted due diligence under that section. Many sessions of the Legislature of that State have been held since that decision

was given, and the people of that State have therefore had ample opportunity to amend the section in that regard, had they not been satisfied with the construction there given by the highest court of their State. If the people of that State are satisfied with the construction there given by the Supreme Court, is it not fair and equitable to give said section the same construction in suits in which foreigners are parties?

Therefore we most respectfully contend that the judgment of the Supreme Court of California in this case should be affirmed, for the reason and upon the ground that the affidavit made by Roberts upon which the order of the trial court for the publication of the summons was based, shows that inquiry was made of fifteen persons, whose names are given in the affidavit, and it further states that inquiry was made of old residents of the city of San Diego, the former neighbors of said defendants, and that the affiant also made other diligent inquiry to find said defendants.

Now in all the cases that have come before the highest courts of the several States, and that have come before the Federal courts, no affidavit is shown to have contained so many facts, showing diligence, so many persons of whom inquiries were made to show the residences of the defendants, so many officers interrogated; in none were such great endeavors made to find the defendants, in none did the sheriff or other person serving the process make as diligent and thorough and continued search as was made by the sheriff in this case, as shown by the record; none of the affidavits presented were as complete in detail in efforts to find the defendants, as is the affidavit of Roberts in this case. Now these facts fully meet the requirements of the several courts, and vested the trial judge with ample authority to make the order for the pub-

lication of the summons in this case, since said courts hold as follows:

There being some appreciable evidence of a legal character which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. Until reversed or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid. *Ligare vs. Cal. S. R. R. Co.*, 76 Cal., 610, 613; *Forbes vs. Hyde*, 31 Cal., 342. It is only when there is a total want of evidence upon some essential point that the court will fail to acquire jurisdiction. Matter of *Faulkner*, 4 Hill, 589. When the proof has a legal tendency to make out a case in all its parts for issuing process, then, although the proof may be slight and inconclusive, the process will be held valid until set aside by a direct proceeding for that purpose. *Miller vs. Brinkerhoff*, 4 Denio, 118. If the proof had a legal tendency to make out the case required by the statute, although it be so slight and inconclusive that upon a direct proceeding to review it the magistrate's action would be reversed, yet, in a collateral action the process will be deemed valid. His decision may be erroneous, but it is not void. *Skinnion vs. Kelly*, 18 N. Y., 355. The judge making the order of publication was empowered to pass upon the sufficiency of the evidence that due diliegnce has been used to find the defendant within the State, and that he could not there be found. If the affidavit presented to a judge vested him with jurisdiction to pass upon the question of the sufficiency of the proof of these facts, and if the proof satisfied him, neither his order or the judgment based thereon could be impeached collaterally. *Belmont vs. Cornen*, 82 N. Y., 250.

When there is not an entire omission to state some material fact, but it is inferentially or insufficiently set forth, the proceedings are merely voidable. *Harris vs. Claflin,* 13 Pac., 830 (Kans.). Where an affidavit for publication inferentially but insufficiently sets forth a material fact which ought to be expressly stated, the affidavit if otherwise good, will be held merely voidable. *Long vs. Fife,* 25 Pac., 594 (Kans.), and affirming *Claflin vs. Harris, supra.*

If sufficient facts are stated to call into exercise the judicial mind of the court or judge, his judicial determination, however erroneous it may be, cannot be questioned in a collateral proceeding. *Davis vs. Cook,* 60 N. W., 20. And, however slight and inconclusive this evidence may be, if it has a *legal tendency* to prove *diligence,* and that the defendant could not be found in the State, it is sufficient to give the court jurisdiction, *McDonald vs. Cooper,* 32 Fed., 745. The true rule seems to be, that where there is not an entire omission to state some material fact, but it is *insufficiently* set forth, the proceedings are merely voidable. *Britton vs. Larson,* 23 Neb., 806; *Aikins vs. Aikins,* 9 Neb., 200; *Forbes vs. Hyde,* 31 Cal., 342; *Slocum vs. Slocum,* 17 Wis., 150. We are of the opinion that inasmuch as the statute requires for an order of publication that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of by appeal or some direct proceedings and cannot be urged to impeach the judgment collaterally, *Pennoyer vs. Neff,* 95 U. S., 714. If they do not make the judgment void it necessarily follows from the repeated decisions cited, that it cannot be set aside on account of such defects upon motion under the California laws after the lapse of one year from its entry. There is a difference between *want* of jurisdiction and a *defect* in obtaining juris-

diction. In the case of an *attempted* service the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter which by law it was authorized to hear and decide, although erroneous, is not void. Freeman on Judgments, Sec. 126. The tendency of recent decisions is to strengthen the position that the *orders* and *proceedings* of courts of *general jurisdiction* where process is constructively served are supported by the same presumption as where the court proceeds upon personal service, and they can no more be void for mere errors or irregularities than can its other *orders* and *judgments. Freeman,* Sec. 127. With regard to the alleged defect in the affidavit for publication. It may be a defective affidavit, or, possibly, the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied the affidavit has served its purpose, and though a revisory court might see in some such departure from the strict direction of the statute, sufficient error to reverse the judgment we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property. *Martin vs. Pond,* 30 Fed. Rep., 18; *Cooper vs. Reynolds,* 10 Wall., 308. Where the affidavit made *tends* to prove the required facts and the court or judge adjudges it sufficient, such adjudication is conclusive in a collateral proceeding, although it might be erroneous and reversible on direct appeal for insufficiency. Such affidavit contained some competent evidence tending to establish the requisite statutory facts to authorize the substituted service, and therefore the adjudication of its sufficiency by the court was conclusive when attacked collaterally. *Cohen vs. Portland Lodge,* 144 Fed.,

266. Where the affidavit for the publication of a summons, in the State of Oregon, alleged that the affiant had inquired of one of the executors of the will of the decedent, as to the whereabouts of the defendants, and was told that they were in a particular institution in San Francisco, California, such affidavit sufficiently showed diligence on the part of the affiant, and that such affidavit *without* a copy of the return of the sheriff on the summons sought to be served constituted *prima facie* evidence of the defendants' absence from the State. *Cohen vs. Portland Lodge*, 152 Fed., 357. Where the affidavit tends to prove such facts, and the court or judge adjudges it sufficient, such adjudication is conclusive in a collateral proceeding. *George vs. Nowlan*, 38 Ore., 537, 64 Pac., 1. Undoubtedly property rights of great value have been settled according to the rule laid down in *Rue vs. Quinn*, and the many courts of California have followed and applied it in determining the property rights of numerous litigants, all of which rights would be unsettled and perhaps great wrongs done by now overruling that decision; therefore, the rule of *stare decisis* should apply. "It should require very controlling considerations to induce any court to break down a former decision, and lay again the foundations of the law" (7 How., 569). And a court when asked to do so should consider how far its action would affect transactions entered into and acted upon under its former decisions (11 Tex., 455). Where there have been a series of decisions by the supreme judicial tribunal of a State, the rule of *stare decisis* may usually be regarded as impregnable (29 Ind., 470). Especially is this the case where the law has become settled as *a rule of property*, and titles have become vested on the strength of it (44 Mo., 206). Where any principle of law is laid down by a State court regarding a sale of real property, the United States courts

will follow it in analogous cases (6 Wall., 723; 7 How., 738). "This rule will also be invoked in favor of *certainty* and *stability* in the law." *Schoonover, Trustee, vs. Birnbaum,* 148 Cal., 550, where that court, sitting in bank, further said: "The cases of *In re Carriger,* 107 Cal., 618, and *Rosenthal vs. Mercede Bank,* 110 Cal., 198, were decided in 1895. In the former a petition for rehearing was filed and was denied by the court in bank. It must be assumed that these decisions have been, since their rendition, taken as the law of the State upon the subject, and that persons contracting with respect to lands have acted upon them and made investments and contracts accordingly. In the ten years that have intervened it may be presumed that many such investments and contracts have been made. The rule of *stare decisis* is consequently applicable. Upon this subject the following language of the Court in *Pioche vs. Paul,* 22 Cal., 110, is peculiarly applicable: 'Under such circumstances, none but the strongest reasons would justify the Court in taking such action as is asked by the appellant. Fickleness in courts is always to be deprecated, but especially in matters relating to titles to real estate. Stability is required in such cases above all others. Therefore, no well considered decision ought to be overruled unless it clearly violates some well established rule of law, and great evils are likely to flow from suffering it to stand as a rule of property. * * Ten years have passed since the decisions were promulgated. If the legislative department had not been satisfied with the judicial interpretation, there has been ample opportunity to amend the statute. * * In view of these circumstances, we are of the opinion that they should be adhered to." That the defendant cannot after due diligence be found within the State and that his residence is unknown to the affiant has often been held sufficient to warrant the reasonable inference of due dili-

gence, and to authorize service by publication. *Colton vs. Rupert,* 60 Mich., 318; *Horton vs. Monroe,* 57 N. W., 109; *Crouter vs. Crouter,* 30 N. E., 726; *Bickerdike vs. Allen,* 41 N. E., 740; *Salisbury vs. Cooper,* 69 N. Y. Sup., 258. In the following named States the laws either do not require an order of the court or judge for the publication of the summons where substituted service is required, or if they do require it, such affidavit need not state the probative facts showing search and inquiry, and due diligence, but the order will issue upon the presentation of an affidavit which states that defendants are non-residents of the State and cannot after due diligence be found within the State and that their residence is not known to the affiant. In many of such States the judge is not required to make the order, but the clerk of the court makes the order upon presentation of the affidavit to him, thus showing, as the learned author, Freeman, says (Sec. 127), that "the tendency of recent decisions is to strengthen the position that the *orders* and *proceedings* of courts of *general jurisdiction* where process is *constructively* served are supported by the *same* presumptions as where the court proceeds upon *personal* service, and they can no more be void for mere *errors* or *irregularities* than can its other *orders* and *judgments.*" Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Illinois, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Washington, Wisconsin, and Wyoming.

An order of a court based on an affidavit for publication of the summons which contains an allegation that defendant is a non-resident of the State, and cannot after due diligence be found therein, if erroneous, its error is not collaterally assailable, and cannot vitiate a judgment by default based upon a proper service of the summons by pub-

lication. *People v. Norris,* 144 Cal., 422. A motion to vacate a judgment which is valid upon its face, made more than six years after the entry of the judgment, upon which the affidavit of publication of summons and the publication thereof are attacked, must be determined upon the principles governing a collateral attack upon the judgment. *People v. Mason,* 144 Cal., 770. It is urged that the judgment is void on its face, the contention in this respect relating entirely to the service of the summons in the action in which such judgment was given, the principal point made being that the affidavit for publication of summons did not state sufficient facts to give the court jurisdiction to order service made by publication. The question as to the sufficiency of a similar affidavit to give the trial court such jurisdiction has been discussed by this court several times in cases of the same character as this, and the affidavit held sufficient. Every contention made by plaintiff in support of her claim that the judgment under consideration is void upon its face has already been answered by decisions of this court, some of which, it should be said, have been rendered since the institution of this action. (See *Rue v. Quinn,* 137 Cal., 651, 66 Pac., 216; *Weis v. Cain,* (Cal.), 73 Pac., 980; *People v. Norris,* 144 Cal., 422; *People v. Mason,* 144 Cal., 770; *Sharp vs. Salisbury,* 144 Cal., 722.) *Cargile v. Silsbee,* 148 Cal., 260. In the case of *People v. Wrin,* 143 Cal., 13, it is said: but mere error of the court could not be taken advantage of on this motion, made nearly five years after the rendition of the judgment. To obtain the desired order vacating the judgment it was necessary that the judgment should be void on the face of the record, or, in other words, it should appear from the record that the trial judge had not jurisdiction to make the order of publication. (*Forbes v. Hyde,* 31 Cal., 342; *Ligare v. California, etc., R. R. Co.,* 76 Cal., 610.) The affidavit contained some evidence of

diligence to find the defendant. Placing the summons in the hands of the sheriff for service, and the sheriff's return thereon, the inquiry of the treasurer, who under the law was to receive the money which had been or was yet to be paid on the land, and was therefore the most likely of any officer in the county to have the postoffice address and know of the residence of the defendant, and the inquiry of other persons, all show the exercise of some diligence. We cannot, therefore, say that the court was without jurisdiction to make the order or that the order was void, and if the order was valid, of course the judgment was also valid. The case before us does not differ in principle from the case of *Rue v. Quinn*, 137 Cal., 651. That case is so recent, and was so thoroughly considered and reconsidered, that it seems unnecessary here to repeat the arguments contained in it or to attempt to add anything further. (See also *Weis v. Cain*, 73 Pac., 980.)

Now, in conclusion, let us state that over ten years ago ***Rue vs. Quinn*** was decided by Department 1, of the Supreme Court of California, all the justices of that department concurring (66 Pac., 216). A rehearing was asked for of the court in bank, which was granted, and the court, after very elaborate briefs and arguments were presented, by the regular attorneys in the case, assisted by other atorneys, the full court consisting of seven justices, affirmed the decision of Department 1 (70 Pac., 732). The court was asked to grant and granted a further hearing of the case on a question not previously noticed very thoroughly, and after this third hearing, the court again, sitting in bank, affirmed unanimously the Department's opinion (70 Pac., 1129). Since that time that case has been affirmed in nine separate and distinct cases by the Supreme Court of California, which cases have been hereinbefore cited. The construction of Secs. 412-413 and

473 of the Code of Civil Procedure of the State of California, have, therefore, been the settled law of that State for over ten years. These cases were also cited and unanimously affirmed by Department 3, of the California Appellate Court, in *Merchant's National Union vs. Buisseret*, 15 Cal., — App. 444. Now *Rue vs. Quinn* has been approved by nine justices of the Supreme Court and by three justices of the Appellate Court of California, a consideration rarely given to any question brought before the highest judicial tribunals of a State. The trial courts of California, and no doubt the courts of many of the other States, have decided many suits involving titles to property of great value, and have adjudicated the rights of numerous litigants by the use of *Rue vs. Quinn*, and the other California cases affirmed, as authorities in such judicial opinions; and the members of the bar of California have probably passed upon and approved abstracts affecting titles to property of immense value, and in doing so have relied upon these California decisions in advising their clients. It, therefore, appears that it would be very unjust and inequitable, and might cause very great property losses, by disturbing those decisions at this late day. Further, if the plaintiffs in error in this case have suffered any loss, such loss can only be attributed to their own negligence. Where one of two parties must suffer loss, it should be the one by whose negligence such loss was caused; and as stated by this Honorable Court in 7 How., 569, "it should require very controlling considerations to induce any court to break down a former decision and lay again the foundations of the law." And as stated in 29 Ind., 470, "where there have been a series of decisions by the supreme judicial tribunal of a State, the rule of *stare decisis* may usually be regarded as impregnable. Especially is this the case where the law has become settled as a *rule of property*,

and titles have become vested on the strength of it (44 Mo., 206). We therefore most respectfully submit that the decision in this case of the Supreme Court of California should be affirmed.

WILLIAM J. MOSSHOLDER,
*Attorney for Defendant in Error.*

SAMUEL HERRICK,
*Of Counsel.*

# JACOB *v.* ROBERTS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 169. Argued January 25, 1912.—Decided February 19, 1912.

While an essential element of due process of law is opportunity to be heard, a necessary condition of which is notice, *Simon* v. *Craft*, 182 U. S. 427, personal notice is not always necessary. *Ballard* v. *Hunter*, 204 U. S. 241.

In this case, *held*, that the proceedings for service by publication show sufficient inquiry was made to ascertain the whereabouts of the persons to be served and who were served by publication under provisions of § 412 of the Code of Civil Procedure of California, and that due process of law was not denied by service in that manner.

154 California, 307, affirmed.

THE facts, which involve the question of whether due process of law was afforded by substituted service of process under the statutes of California, are stated in the opinion.

*Mr. Sam Ferry Smith*, for plaintiffs in error:

The judgment was rendered in a proceeding, and constituted a proceeding, wherein the only service of process made, or attempted to be made, was substituted or constructive. Such service did not give reasonable and ade-

quate opportunity of being heard therein, prior to the rendition of such judgment. It therefore did not constitute due process of law, and such proceedings were in violation of the constitutional right guaranteed by Fourteenth Amendment. "Due process of law," as the meaning of these words has been developed in American decisions, implies the administration of law according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. *Arndt* v. *Griggs*, 134 U. S. 321; *Belcher* v. *Chambers*, 53 California, 635; *Braly* v. *Seaman*, 30 California, 611; *Burton* v. *Platter*, 53 Fed. Rep. 903; *Cooper* v. *Newell*, 173 U. S. 555; *De La Montanya* v. *De La Montanya*, 112 California, 109; *Galpin* v. *Page*, 18 Wall. 350, 368; *Hagar* v. *Reclamation District*, 111 U. S. 708; *Happy* v. *Mosher*, 48 N. Y. 317; *Hahn* v. *Kelly*, 34 California, 407; *Hart* v. *Sansom*, 110 U. S. 151; *Holden* v. *Hardy*, 169 U. S. 389; *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Mallett* v. *State*, 181 U. S. 589; *Marx* v. *Ebner*, 180 U. S. 314; *Neff* v. *Pennoyer*, 17 Fed. Rep. 1279; *Pennoyer* v. *Neff*, 95 U. S. 737; *Roberts* v. *Jacobs*, 154 California, 307; *Roller* v. *Holly*, 176 U. S. 402; *Ricketson* v. *Richardson*, 26 California, 149; *Rue* v. *Quinn*, 137 California, 651; *Scott* v. *McNeal*, 154 U. S. 34; *Shepherd* v. *Ware*, 48 N. W. Rep. 774; *State* v. *Guilbert*, 47 N. E. Rep. 557; *Simon* v. *Craft*, 182 U. S. 436; *Thompson* v. *Circuit Judge*, 54 Michigan, 237; *Wilson* v. *Standefer*, 184 U. S. 399, 415; *Johnson* v. *Hunter*, 147 Fed. Rep. 133; *Howard* v. *De Cordovia*, 177 U. S. 609; *Flint* v. *Coffin*, 176 Fed. Rep. 877; *Wheeler* v. *Cobb*, 75 N. Car. 22; *Romig* v. *Gillett*, 187 U. S. 111, 117; *Stillman* v. *Rosenberg*, 78 N. W. Rep. 913; *Grigsby* v. *Wopschall*, 127 N. W. Rep. (S. Dak.) 605; *Cochran* v. *Markley*, 87 N. W. Rep. 2.

*Mr. William J. Mossholder*, with whom *Mr. Samuel Herrick* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question involved is whether a judgment quieting title to a piece of land in California against plaintiffs in error upon substituted process of the publication of the summons under the statutes of that State constitutes due process of law under the Fourteenth Amendment to the Constitution of the United States.

The judgment was rendered in 1897, and eight years afterwards the entry of judgment was set aside by the trial court upon petition of plaintiffs in error on the ground that the facts set out in the affidavit for the order of publication did not show the due diligence required by section 412 of the Code of Civil Procedure of the State. The order was reversed by the Supreme Court of the State. 154 California 307.

The action against plaintiffs in error was brought by defendant in error in the Superior Court in the County of San Diego, State of California, by verified complaint on March 25, 1897, upon which summons was issued and returned not served because defendants in the action (plaintiffs in error) could not be found. An amended complaint was filed April 3, 1897. It described the land as lots in the city of San Diego, of which it alleged that the plaintiffs, defendants in error here, were then and had been for a long time in possession, claiming title in fee. It also contained the usual allegations that the defendants, and each of them, claimed some estate or interest in the land, and that it was entirely without any right whatever. It was prayed that the defendants be required to set forth the nature of their or his claim, that it be determined by the decree of the court, and that they and each of them be forever enjoined from asserting any claim in and to the lands adverse to the plaintiffs. General relief was prayed.

Summons was issued and the sheriff's certificate of re-

turn recited that "after diligent search and inquiry," he was unable to find the "defendants or either or any of them in this San Diego County."

An affidavit for publication of summons was then presented to the court and filed. It recited the proceedings, including the issue of the summons and its return by the sheriff, as we have stated, and further set forth the following, among other matters:

"That the cause of action is fully set forth in his verified complaint on file herein; that said defendants, or either or any of them, after due diligence, cannot be found within this State, and this affiant, in support thereof, states the following facts and circumstances:

"That affiant, for the purpose of finding said defendants and ascertain their place of residence, has made due and diligent inquiry of the old residents of the City of San Diego, the former neighbors of said defendants, and is informed by D. Choate, who has lived in the City of San Diego over twenty-five years, that he thinks the defendants are not within the State of California, and he does not know of their residence and has not heard anything of them, or either of them or of their residence or post-office address, for more than twenty years, and this affiant is informed by George W. Hazzard, who has lived in San Diego for over twenty-five years, that he has no knowledge as to the whereabouts of the said defendants, or either of them. Plaintiff also made inquiry of Ed. Dougherty, who is an old resident of San Diego, and said Ed. Dougherty informed plaintiff that he did not know the address or residence or where the defendants, or either of them, could be found, and did not believe that they were in the State."

The affidavit also stated that inquiry was made of certain county and city officers and that they all—

"stated to affiant that they did not know the residence of the defendants, or either of them, their post-office

address or where they could be found; and none of the above-named parties had heard of the post-office address or residence of the defendants, or either of them, since they have resided in the said city of San Diego.

"The affiant has made other diligent inquiry to find said defendants, or either or any of them, and has not been able to find them or any of them within—. The affiant has no knowledge of the residence or post-office address of the defendants or either of them or where the defendants, or either of them, could be found. This affiant, therefore, says that personal service of said summons cannot be made on the defendants—Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, or either or any of them."

An order of publication was duly made, and the summons duly published in accordance therewith. Judgment by default was subsequently duly entered.

The assignments of error all express the contention that the trial court was without jurisdiction to render the judgment against plaintiffs in error, and that hence their property has been taken without due process of law.

Undoubtedly, as contended by plaintiffs in error, the essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice. *Simon* v. *Craft*, 182 U. S. 427. But personal notice is not in all cases necessary. There may be, and necessarily must be, some form of constructive service. *Ballard* v. *Hunter*, 204 U. S. 241. Upon this, however, we do not enlarge, as we do not understand plaintiffs in error contest it. They recognize that substituted service of judicial process may be authorized, but they contend that it can only be authorized when "it is impossible or impracticable to obtain actual service, and when so authorized the substituted service provided for in the statute must be of such character that it will be *reasonably probable* that the party whose property is placed in jeop-

ardy will be apprised of the pendency of the action and will be afforded a *reasonable opportunity* to appear therein and make his defenses." (The italics are ours.) We do not understand that plaintiffs in error attack the kind or time of publication as not giving a reasonable probability of notice or opportunity to be heard, but attack the showing upon which it was made; in other words, that the showing was not sufficient to authorize the publication of notice, the showing not being legally sufficient to justify a resort to that form of notice. It is true plaintiffs in error say that "the designation of the newspaper and the length of time of publication must necessarily depend upon the residence of the defendant, or at least his probable whereabouts, unless it is disclosed by the affidavit that plaintiff has no knowledge on the subject, and that he has exercised due diligence to inform himself." These quotations from the argument of plaintiffs in error we make as exhibiting the elements of their contentions.

We make no reference to the statute of the State, as that as written is not attacked except, it may be, as it is applied by the Supreme Court of the State in this and prior decisions. We say "prior decisions" because the court puts its ruling explicitly on one of its prior decisions and rejects the contention that it had overruled other decisions.

We now turn to what the papers in the case exhibit and what they explicitly or impliedly establish. The property involved was lots in the city of San Diego, of which the plaintiffs in the action, defendants in error here, were in possession at the time of commencing the action, and had been for a long time. The fact has some force. San Diego was of size and importance enough to make it worth while for those having interest in property to assert it. Plaintiffs in error, however, permitted defendants in error to be in possession of property which they now say was and is theirs. Why, they do not explain, nor

where they were. They rest upon the face of the papers, and they having that right we will consider the sufficiency of the papers under the statute.

We have set out the affidavit. It shows inquiry of the whereabouts of plaintiffs in error of their former neighbors and other residents of San Diego. One of them replied that he had not heard of them, of their residence or post-office address, for over twenty-five years. Another also had not heard from them and did not believe they were in the State. Inquiry was also made of nineteen county officers and three state officers, sheriffs, county clerks; tax collectors, county and state; assessors, county and state, and of the postmasters of the State. Neighbors, residents and officers who, in the intercourse and business of life would almost necessarily come in contact with plaintiffs in error or hear from them, had no knowledge of them. It may, however, be said, and indeed is said, that other parts of the State were not searched, and that this was necessary, as the process of the court could run to every county in the State. The requirement is extreme and we are cited to no cases in which it is decided to be necessary. The affidavit shows besides that defendant in error made diligent inquiry to find plaintiffs in error and had no knowledge of their residence or post-office address or of either of them or where they or either of them could be found.

We think plaintiffs in error were afforded due process.

*Judgment affirmed.*